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Nos. 336-339

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

NATIONAL LABOR RELATIONS BOARD,
Petitioner
v.
HEARST PUBLICATIONS, Incorporated

NATIONAL LABOR RELATIONS BOARD,
Petitioner
v.
STOCKHOLDERS PUBLISHING COMPANY, Inc.

NATIONAL LABOR RELATIONS BOARD,
Petitioner
v.
HEARST PUBLICATIONS, Incorporated

NATIONAL LABOR RELATIONS BOARD,
Petitioner
v.
THE TIMES-MIRROR COMPANY

On Writs of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR THE INTERNATIONAL PRINTING PRESSMEN & ASSISTANTS' UNION OF NORTH AMERICA, AMERICAN FEDERATION OF LABOR, AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The International Printing Pressmen & Assistants' Union of North America, organized October 8, 1889 (hereinafter termed the "International") is a labor union affiliated with the American Federation of Labor.

Pursuant to the provisions of Rule 27 (9) of the Rules of this Court, the International made application to all the parties to the within cases for their written consent to the filing of a brief *amicus curiae* herein.

The Solicitor General, on behalf of the National Labor Relations Board, gave his consent.

All four parties respondent have refused their consent.

The International, since June, 1912, has been awarded exclusive jurisdiction under the Federation to charter subordinate unions of newsboys, carriers or other persons engaged in the single-copy distribution of newspapers.

Special reasons for the granting of this motion are contained in the accompanying brief.

BRIEF FOR INTERNATIONAL PRINTING PRESSMEN AND ASSISTANTS' UNION OF NORTH AMERICA, AMICUS CURIAE

INTEREST OF PARTY FILING THIS BRIEF

The question in these cases—whether the newsboys reasonably may be found to be employees of newspaper publishers within the meaning of the labor laws—is, we believe, one of first impression in the courts of the United States. The Board has uniformly found the requisite status to exist (except in one case, where the newspaper maintained no street circulation department) yet this is the only instance where resort was had to the courts. The issue here, if determined adversely to the newsboys, will sweep away a bargaining structure imbedded in this area of the labor movement and there recognized and developed for more than a generation. Such a result would fasten on these men (generically termed "newsboys") all the disadvantages of the labor status with none of the advantages of the independent merchant status, nullify their past gains, and deprive them of the only protection appropriate to their actual condition.

The International has been affiliated with the American Federation of Labor since 1889. In 1912, the International was first granted exclusive power under the Federation to charter newsboys', carriers' and similar unions, and since that time many such unions have become affiliated with it as subordinate unions. A list of those unions within the continental United States, certified by International President George L. Berry, and derived from the

Official Directory of the International, dated October 16, 1942,[1] is made a part of this Brief and attached hereto as Appendix "A".

The newsboys in these unions are adult workers with habits of discipline and responsibility. To be eligible for membership they must be at least eighteen years old. They have a long history of collective bargaining and contractual relations with publishers. Since it is the policy of the International not to claim jurisdiction over any union unless the suggestion of affiliation comes from the union itself, there are several similar unions that are affiliated directly with the American Federation of Labor as Federal labor unions. A list of those unions, certified by President William Green of the American Federation of Labor, and derived from the official records of the Federation, is also made a part of this brief, as Appendix "B".

Similar unions are also either affiliated directly with the Congress of Industrial Organizations, or are a component part of international or local unions chartered by the Congress.

Other similar unions are "independent", that is, are not affiliated with any other local, international or national labor or other organization. The facts relative to those unions do not appear to be available from any official source so far as we have been able to determine.

The ruling of this Court in the cases at bar will determine the right of the members of all these newsboys' unions to the protection of the labor laws under the national policy enunciated by and implicit in the Act.

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[1] Several other newsboys' unions have been chartered by the International since this date.

LABOR ORGANIZATION AND RELATIONS

(a) Organization

The Constitution and By-Laws granted to the International by the American Federation of Labor, as revised and adopted June, 1912,[2] is the first which granted exclusive jurisdiction to the International over subordinate unions of newsboys, carriers or other such organizations. Every succeeding constitution of the International,[3] through the present Constitution, revised and adopted September, 1940, contains a similar provision regarding newsboys' unions.

The organization of newsboys in labor unions is not new. It dates from the growth of large-scale newspaper advertising and the consequent development in the rapid single-copy newspaper street dissemination of news, spurred by the immense sums derived from advertising revenues, as measured by and dependent on circulation. As in other areas of labor organization, it has been a spontaneous and nation-wide movement resulting, among other things, from the grave inequalities inherent in the employer-employee relationship where collective bargaining is impossible. The inception and growth of these unions have been the product of the conditions which brought them into

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[2] The pertinent provision of the Constitution of 1912 was as follows: "Article I, Sec. 2. The jurisdiction of this International Union shall embrace the entire continent of North America, and in it alone is vested the power to charter, regulate and control subordinate unions of Printing Pressmen, Assistants, Rollermakers, Newsboys, Carriers and such other organizations not chartered by an International Union."

[3] These Constitutions were adopted and approved in June 1913; June, 1914; June, 1916; October, 1920; September, 1922; August, 1926; August, 1928; July, 1933 (adopted by referendum in February, 1929); and September, 1940.

being and the necessities of the social structure which dictated their continuance. No one sat down in isolation and decided it would be a good idea to have newsboys' unions throughout the United States. The exigencies and peculiarities of the newspaper industry and the place of the street newsboy therein caused the creation of those unions, organized by different persons at different times and in different parts of the country.

(b) Labor Contracts and Relations

The pattern of collective bargaining between newsboys on the one hand and publishers on the other has evolved and been maintained over many years. Many contracts have resulted from collective bargaining, and the terms of those contracts are substantially those rendered familiar by labor contracts in the newspaper and other industries.

These contracts have been pivotal in creating that industrial peace it was the policy of the Act to establish and maintain. The main terms of several such contracts in effect on October 1, 1942, derived from official records[4] of the International, are reprinted in this brief as Appendix "C".

A contract between the Cleveland Newspaper Venders' Union (an independent union organized in the spring of 1934), and The Scripps Publishing Company, The Plain Dealer Publishing Company and The Cleveland Company, is made a part hereof as Appendix "D". The contract

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[4] "Newspaper Minimum Wage Scales, Hours and Working Conditions of Subordinate Unions of the International Printing Pressmen and Assistants' Union of North America."

was a continuation of a one-year contract made in June, 1934, between the same parties, after a newsboys' strike against the three publishers. On the expiration of that contract a new two-year contract was entered into with the publishers.

This last Cleveland contract (Appendix "D") expired in June, 1940 and was not renewed when the Cleveland newsboys went out on strike after the publishers refused to recognize the union as bargaining agent for home delivery carriers. The strike is described in the June 22nd, 1940, issue of Editor & Publisher as "probably the largest of its kind".[5] It was attended by considerable violence. The June 19th, 1940, issue of Editor & Publisher states that "more than sixty persons" were arrested "on charges of malicious destruction and disorderly conduct". The publishers won the strike; the independent newsboys' union, after many months, disbanded. Rather full reports of the strike are contained in the June 22nd and September 4th, 1940, issues of Editor & Publisher. Those reports are reprinted herein as Appendix "F".

A contract of the Seattle Newsboys' Union No. 15834, A. F. L., with the major Seattle publishers is made a part hereof as Appendix "E". The contract was for a term of three years from July 1st, 1937,[6] and is reprinted from the November, 1940, issue of the American Federationist, the official organ of the American Federation of Labor.

The present contract of the Philadelphia Newspaper

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[5] Appendix "F", p. 40a.

[6] The contract was subsequently renewed for five years from its expiration date for a further period of five years.

Carriers' Union, Local No. 20442, A. F. L.,[7] and the major Philadelphia publishers is made a part hereof as Appendix "G". This was a four-year contract[8] beginning May 9, 1939. There has been no written renewal of this contract, although some verbal alterations have been made since May 9, 1943.

Since the reversal of the Order of the Board in the present cases by the Circuit Court of Appeals, many publishers have declined to bargain with the unions.

The Philadelphia Newscarriers' Union, Local No. 504, of the International, filed petitions for certification and investigation pursuant to Section 9 (c) of the Act with the Fourth Regional Office of the National Labor Relations Board, in Philadelphia. These petitions have been withdrawn, without prejudice, pending the decision of this Court in the cases at bar.

In 1941 a so-called "newsdealers' " union, holding a Federal charter from the American Federation of Labor, went out on a "wild-cat" strike against the major New York publishers. A temporary injunction,[9] issued by Jus-

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[7]This Union became affiliated with the International in March, 1942, and is now the Philadelphia Newsboys' Union, Local No. 473, of the International.

[8]In addition to the wage and expense provisions, a noteworthy feature of this contract is an agreement for the filling of open corners by the union on a preferential basis. The Board properly notes in its brief that the problem of regularizing hiring practices implicit in the so-called "sale" of corners involved in these cases is a matter for collective bargaining. There can of course be no "sale" of public sidewalks, and the jealously guarded, absolute and freely exercised right of the publishers to "cut off" papers makes any such practice illusory. The power to "cut off" papers is the power to discharge and in practice is so used.

[9]*People vs. Masiello*, 177 Misc. 608, 31 N. Y. S. (2) 512 (Sup. Ct. 1941).

tice Koch of the Supreme Court of New York, put an end to the strike and to the union.[10] The union's charter was suspended by the American Federation of Labor shortly thereafter.

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[10] In the *Masiello* case the question of employer-employee relationship within the meaning of the Act, or for any other purpose, was not presented at all. On motion made in the name of the people of the state of New York, and on motion of its Attorney General, a temporary injunction was granted, on the theory that the action of the so-called newsdealers (comprised among others, of large distributors and storekeepers, who sold cigarettes, candy, etc., and owned or rented *private property* used in their commercial activity in joining in common action against a majority of the New York newspaper publishers, constituted an illegal monopoly under a local anti-trust law.

Even though the question of an employer-employee relationship was not litigated at all; that the persons involved were storekeepers in large measure, and that the case was heard before a single justice on a motion for a temporary injunction and *has not yet been ordered down by the plaintiff for final hearing*, the ruling has been severely criticized:

> ["In the Masiello case] the publishers prescribe the place where the newsdealer is to set up his stand, the number of papers he can sell, how the papers are to be arranged on the stand, and the price at which the papers are to be sold. These practices are characteristic of the employer-employe relationship, and to deny the newsdealers the benefits of anti-injunction legislation may deprive them of the only economic weapons appropriate to their status * * *.
>
> "According to the law [of New York City] as it now stands, groups of independents are read out of the statutes though the use of a criterion borrowed from the law of agency and designed for tort, contract and workmen's compensation cases. Formal relations and doubtful analogy should not be brought in to control the decision of cases of this kind in the labor field." *Judicial Restrictions on Peaceful Picketing by "Non-labor" Groups*, 51 Yale Law Journal 1039 at 1040, 1041.

Argument

After the strike had thus failed and the charter of the Federal labor union had been suspended, the New York Newsboys' Union, Local No. 471, was chartered by the International in June, 1942. That union has not yet been recognized by any of the New York publishers, the refusal of several of them being predicated solely upon their stated fear of reprisals if they should bargain with the union. They refer to the *Masiello* case as a basis for their apprehension. Petitions for investigation and certification pursuant to Section 9 (c) of the Act having been filed with the Second Regional Office of the National Labor Relations Board in New York, the petitions were thereafter withdrawn, without prejudice, at the suggestion of the Regional Office, pending the disposition by this Court of the present cases.

The pattern of concerted activity which characterizes "employees" generally was well developed among newsboys at the time the National Labor Relations Act was passed. As long ago as 1912, when the pressmen in Chicago were "locked out"[11] for a time, the newsboys, together with several other crafts, went out on strike. A contemporary comment appears in The American Pressman, trade journal and official publication of the International:

> "The rank and file's attention is called to the fact that in sympathy with us in Chicago the Stereotypers, the Machinists, Newsboys, Carriers and Drivers are upon the streets endeavoring by joint alliance to defeat the publishers' proposition in driving our unions from the newspaper industry. Our International

[11] *Imperial Hearst*, Ferdinand Lundberg (Modern Library Edition) pp. 156, 161, 167-9, 194, 195.

Union has accepted their support and in turn we are required to give them financial assistance and the fullest consideration for their loyalty to the trades union movement. I urge the rank and file of our membership to consider this splendid loyalty upon the part of these two thousand men of other trades that have withdrawn from their work in Chicago in order that they might be of some assistance to us in promoting our campaign. We cannot, in justice to their cooperation, in justice to trades unionism, or in justice to humanity, hesitate one second in the support of which those men are so deserving."

The President's Letter, "The American Pressman", Volume 22 (1912), page 329.

"* * * we have made it necessary that this class of unskilled workers be recognized as well as organized, and it is to be hoped and reasonably expected that in the future we may see a well organized union of newsboys throughout the country joining together with the present international unions in the work of improving the economic and social conditions of all, irrespective of their vocation."

The President's Letter, *The American Pressman*, Volume 24 (1913), page 39.

This long record of hostility[12] to organization of and negotiation and contracting with unions of newsboys is clearly neither an isolated phenomenon, nor of recent origin.

That the newsboys' relationship to the publishers gives rise to economic problems indistinguishable from those of any other labor group is seen most directly by an Order, dated February 27, 1943, of the Newspaper Ad-

[12] See *Imperial Hearst*, *supra*, at pp. 161, 195, 300.

visory Panel of the War Labor Board providing in part that:

> "For the purpose of this order the daily newspaper industry printing and publishing panel shall advise the board as to wage and salary rates involving employes in the following departments of daily newspaper printing and publishing establishments: mechanical, maintenance, mailing, editorial, art, circulation (including newsboys), and commercial and kindred department." (Editor & Publisher, February 27, 1943, page 5.)

The Order of the Board made in these cases is based not on empty formalisms, but on a recognition of the realities inherent in and peculiar to the dissemination of news and advertising to the public directly, by means of newsboys, on the streets of Los Angeles. The administrative judgment of the Board, derived from its expertise in this field, and informed by its experience, was exercised in making an Order which was intended to and would, it is submitted, effectuate the purpose of the Act in this field and within the limits of the jurisdiction conferred upon the Board by the Congress.

In this connection an analysis of the nature, significance and mechanics of rapid single-copy street distribution of news and advertising may be deemed helpful.

THE NATURE OF THE WORK DONE

(a) The Rapid Single-copy Street Sale of Newspapers Primarily Involves a Service to the Public and Not the Sale of a Physical Commodity to Newsboys. Effective Performance of This Service Requires Speed and Volume. Speed is Necessary Because the News is Perishable and Volume Because Advertising Depends on It. The Publishers Seek to Achieve Both by Close Supervision Over the Work of the Newsboys.

The sale of a newspaper is plainly not the sale of an ordinary commodity. News and other features contained in the newspaper are the vehicle for the advertising carried in the papers. "Advertisements first appeared in the Impartial Intelligencer of London in March, 1648. Today the power of the press is due to the revenues obtained from this source, making possible the maintenance of large editorial staffs and organizations for the collection of news. In 1927, $252,811,104 and $724,837,083 were received by newspapers in this country from sales and advertising respectively." [13]

The success of a newspaper came to depend on the amount of advertising it carried, and its circulation, both as to quality and quantity,[14] determines the rates it may charge. Circulation, therefore, has become the main preoccupation of any enterprising publisher. "Around 1880 the more important daily newspapers underwent great economic change * * * As store and other display advertising increased in amount, newspapers were continually forced to increase their size. This increase was possible without

[13] 19 New Standard Encyclopædia 62.

[14] 12 The World Book Encyclopædia 4955.

raising subscription rates because of the substitution of wood pulp paper for rag and a constant lowering in the price of the pulp stock. *The newspaper became, consequently, a complicated economic product with two things for sale: to the reader it sold news, editorials and other interesting reading matter; to the advertiser it offered white space at so much per inch. Complications came from the fact that these two joint products had to be marketed in the same container—the white paper on which the news was printed and on which the advertising was displayed.* More and more the advertiser paid the heavier burden in the cost of production. Because advertising rates were based on the number of papers distributed, there resulted a wild race[15] for circulation."[16] (Emphasis added)

But there was a further problem. At first, advertisers had no accurate means of gauging the newspapers' circulation. Then "In 1914 there was organized the Audit Bureau of Circulations. This has become the leading agency for securing reliable information about the circulation and distribution of publications. The work of this bureau came about as the result of several organizations which were interested in the endeavor to develop a generally acceptable means of obtaining reliable, standardized statements of circulation. It was felt that the time was ripe for devising such means, and that the advertiser had a right to know what he was buying when he bought space in publications. It was desirable to know not only the total circulation but also something about the various aspects of this circulation, facts which are as important as the statement of the total amount of the circulation * * *.

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[15] For a popular account of some well-known resulting circulation wars see *Imperial Hearst*, Lundberg (Modern Library Edition) Chapter V, p. 149 *et seq.*

[16] 16 Encyclopædia Britannica 357.

Argument

"In general, the audit bureau reports attempt to answer three main questions: (a) *How large is the circulation?* (b) *Where does it go?* and (c) *How was it obtained?* The bureau operates by requiring from its publisher members a so-called publisher's statement every six months. The bureau itself makes an audited report once a year.

"The Audit Bureau of Circulation became of great value to advertising, because it made available reliable statements of circulation covering many different phases."[17] (Emphasis added)

The sale of a newspaper thus differs from the sale of an ordinary commodity in at least two vital ways: (a) the publisher does not derive his main revenue from the sale of the papers, which are sold for a negligible fraction of their actual cost; and (b) the fact that the advertising must get home to the ultimate reader, who is the real customer both of the publishers and of the advertisers, compels the publisher to retain a deep interest in where the papers are sold, to whom and in what quantities. The publisher must create and meet a continuous demand for the papers, and must have in his service persons willing to be placed on the streets, for fixed periods, in fixed places, and subject to discipline and removal or discharge, as the last link in the chain of distribution, upon a scale and under a control adequate to and appropriate for the demand.

"Spot" news has an undoubted appeal and its lure is widely used to promote the necessary sales. Therefore speed in printing and distributing became crucial. The problem of the publishers is how to accomplish the sale of as many papers as possible, as quickly as possible, to as many different and diverse persons as possible. One of the method by which that is done is the street-sale system

[17] 1 Encyclopædia Britannica 200.

as perfected in Los Angeles.[18] Promotional schemes and devices, news content, features and prizes help to arouse interest, but in the case of ultimate street distribution it is promotional activity according to a well-defined plan in placing, and controlling and stimulating the newsboys in the continuous exposure to the public which converts that interest into sales.

Contrary to the general understanding, large newspapers are not printed merely in several editions, with gaps in between while the news comes in. Aside from "extra" editions, there are numerous "lifts" between editions, so that the same edition contains several printings, the difference between one "lift" and its successor being additional news. Another device for printing "spot" news

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[18] "The methods of delivery employed by newspapers vary in utility with the character of the community and the publication, size of circulation, and frequency of appearance." 12 World Book Encyclopædia 4955. There are, of course, other factors making for variation in circulation systems: the climate and the impact of the history of newspapers in the community also have their effect. Publishers, like others, differ in energy, imagination and enterprise, among other things. Circulation wars have had an effect—not always baleful. The costly and exhausting wars in which the weaker papers were destroyed suggested to the survivors that they could well work together. Thus major publishers frequently have the same groups of newsboys selling so-called competing papers, sometimes as the direct result of collective bargaining with the newsboys' unions (see contracts, Appendices "D", p. 21a; "E", p. 32a, 39a; "G", p. 43a containing provisions against "split" corners, which means against placing two newsboys on the same corner which has been found to have the effect of splitting the sales without increasing their total number). The publisher thus gets his coverage and the newsboy tends more to get a living wage; the right to discharge by cutting off the supply of papers is preserved, not only by agreement among the publishers, but also by the economic fact that discharge by one of several large newspapers effectively puts an end to the newsboys' employment in the industry.

to increase the sale of the papers as they roll off the presses is the "fudge",[19] which is an insertion, usually in a front-page "box", of some late morsel of news, which reaches the streets in a matter of minutes.[19]

The presses therefore roll out the news almost continuously.[20] Within a few minutes a late score of a baseball or football game, late racing news, "flashes" from the battlefronts, or any bit of news may be inserted into

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[19] Newspaper Presswork (Technical Trade School, International Printing Pressmen and Assistants' Union of North America, Section Six) p. 103:

> "All press builders have introduced what is termed a 'fudge device' for the printing of late news.
>
> The word 'fudge' means to insert, or to inject, or to interpolate, and that is about what it is intended the 'fudge cylinder' should do.
>
> The 'fudge' is a small cylinder attached to the second impression cylinder of the press, or built independently over angle bars between press and former, and is designed to print the latest news in one or two columns without the necessity of stereotyping a new full page whenever any new news note is added * * *.
>
> *As illustrative of the use of the 'fudge', the reporting of an important game of baseball may be taken as an example. The forms are closed at the completion of the seventh inning and the plates made and put on the press. A portion of the last column is left blank, the space to be filled in by the use of the 'fudge'.*
>
> *As the game advances the news is sent in direct to the linotype operators, who cast the lines and place them in the 'fudge turtles', and everything is ready for the last word from the ball field, so that it is not unusual that three minutes after the umpire has announced his last decision the 'extras' are being handled upon the streets.*" (Emphasis added)

[20] "High-speed presses can produce 60,000 newspapers in an hour * * *." 12 World Book Encyclopædia 4956.

the presses and reach the streets under the watchful eye of the circulation departments for immediate distribution to the public.[21]

Now in the light of this highly efficient and complex machinery for the distribution of the newspapers, it is easy to imagine what would happen if these street newsboys were not on the spot to distribute the papers to the public. Since the papers are fully returnable, the publisher, for the protection of his circulation and to insure against being swamped with returns, must follow through to the ultimate consumer, the man on the street. Thus the street newsboy is not merely the terminus, he is the focal point for the assault which must be made against the sales resistance of the man on the street. And primarily it is in the interest of the publisher, who must be concerned with the sale to the reader and not with "sales" to the

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[21] Yesterday's news is history. No one knows that better than newspaper publishers. Thus the newsboys here are required to "blast" the headlines, to display the papers prominently, or "pitch that sheet", to "hustle", to "work the white lines", to be continuously at the "spots" assigned to them, and to remain there for a fixed time. Elaborate circulation departments are maintained for this purpose; "district managers", "checkmen", "supervisors", "road men" and "street men" attached to those departments are employed by publishers to see that the newsboy does his work. This does not mean of course that the district managers or their assistants are always at the elbow of the newsboys, for the newsboy's work is necessarily done outside the publisher's plant and frequently over wide areas. But it does mean that there is a rigidly articulated system necessitating that the newsboys be subject continuously to the control of the district managers as to the details of their work. No newsboy would dare question the authority of these supervisors, by whatever name they might be called. In this way, then, the publishers are assured that the newsboys will exert themselves immediately to distribute to the public the newspapers the rolling presses turn out, so that the Audit Bureau of Circulation figures may demonstrate the value of the paper to the advertisers.

newsboy, that the assault is made by the newsboys, who furnish the last intimate impulse in the complex process of single-copy distribution. The newsboy is thus the final and pivotal figure in that phase of the distribution process where the Audit Bureau of Circulation certifies to the advertisers how many of and to whom a publisher's newspapers are actually being sold.

We do not understand that the publishers here challenge these facts. Several of them insisted before the Circuit Court of Appeals on the necessity for speed.[22] It is difficult to see any reason for that insistence unless it was to explain *why* the publishers exercise such detailed control over the newsboys' work. But to explain is not to explain away; to justify the control is not to obliterate it from the record in this case. At the most, the explanation shows there is nothing arbitrary about the system. But nobody says it was arbitrary; surely the fact that there

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[22] "Newspapers are the only product of the petitioner. While current, they have face value. The day after issue, they are worthless except as junk paper. Petitioner is anxious, naturally, to sell as many of its product as possible." Opening Brief for Hearst Publications, Inc., pp. 24, 25.

"The publisher of a newspaper is vitally interested in increasing circulation. Distribution immediately following the issuance of metropolitan papers is a fundamental. Street issues of the Los Angeles Times have an economic life expectancy of about three hours, as is demonstrated by the time of their issuance, viz., 6, 9 and 11:30 p. m. (R. 1156-1157)." Opening Brief for Los Angeles Times-Mirror, p. 33.

"A realistic approach to the question of 'time to work' must be made. Nothing is more perishable than a newspaper, and to contend that because a boy selling newspapers is 'required' to sell the various editions at or about the time they first appear on the street for sale, that such requirement is an evidence of authority or control, is not, in our opinion, meritorious." Reply Brief for Stockholders Publishing Company, Inc., p. 19.

is a very good reason for the control exercised serves only to emphasize the fact that the control actually exists. But the *reason* for the control is immaterial; the *fact* is crucial. If that control was arbitrarily exercised, the system might have been changed during "the long period of dispute"[23] over the newsboys' status.

Moreover, it is important to note that speed alone, with the consequent control over single-copy distribution, is only part of the picture. Newspapers are perishable, but that alone does not make them unique. The point in this connection is that *the risk of loss through perishability is not on the newsboy but on the publisher.* For not only does the latter lose the wholesale price of the paper (which is comparatively negligible) but he is deprived *pro tanto* of the circulation upon which his major revenue depends. That is the reality of the matter. It is a long flight from that reality to elevate these newsboys to an exalted status the benefits and prerogatives of which they in no wise enjoy.

These cases are thus a far cry from those involving the sale of an ordinary commodity.[24] One who sells fruits, vegetables, vacuum cleaners or any ordinary commodity at wholesale is not directly or immediately concerned with

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[23] Dissenting opinion of Judge Denman, 136 Fed. (2) at 615.

[24] The distinction is also clear in this context between daily newspapers, on the one hand, and magazines and periodicals, on the other. The latter are made of sterner stuff; none has a life expectancy of three hours. They depend on a more durable medium than news to attract a large sale, and are not, therefore, published in numerous rapidly changing daily editions; there are no "extras", their issues are not "lifted", and there are no "fudges". And none of them could possibly maintain an elaborate single-copy street distribution department or make possible even a substantial fraction of a living wage to full-time or other newsboys.

the identity and number of the ultimate consumers. He derives his profit solely from the sale of his product to the retailer. His interest in its resale is a long-range interest. The newspaper publisher, on the contrary, cannot merely "sell" [25] his newspapers to the newsboys, and then forget about them until the final figures on sales are computed.

Moreover, the manufacturer or producer of an ordinary commodity maintains no elaborate street circulation department [25a] constantly directing in detail the activity of each retail outlet. If he maintains any staff for high-pressure, rapid, hour-by-hour, day-by-day single street sales of his commodity, the members of such a staff would be his employees. And the ordinary commodity is not dependent on extrinsic values like advertising, which requires a larger and larger circulation if profits are to be greater and greater. The newsboys provide the means by which the required extra circulation is obtained. Stripped of the camouflage of the "mere-sale-of-a-commodity-at-retail" argument, the service or work done is for the publisher and the publisher alone. Each of the publishers involved in these cases is served by hundreds of individuals whose contribution to the publishing business is one of purely manual labor. This relationship is not fortuitous and the data presented by the record herein with respect to

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[25] The dissenting opinion in the Circuit Court of Appeals stated that the Board would have been justified in concluding that "title" to the newspapers did not pass to the newsboys and that therefore no real sale was involved, even if the service aspect of what the newsboys do should, as the majority held, be deemed irrelevant.

[25a] The Herald alone maintained direct and personal control over the newsboys through about sixty-eight District Men (R. 49-56), who worked under a Superintendent of Street Sales and several branch managers (R. 331, 336, 337, 548, 549).

the relationship is typical of the system of distribution prevalent in Los Angeles. The publishers are, and daily seek to be users of newsboys' labor for it is such use which best furthers their enterprises.

"A newspaper never ceases to be a business organization. Though it may promote lofty ideals and may give all the news * * * it can hardly be called a success unless it makes a profit. The first requisite of success in terms either of influence or profit, is a large number of readers."[26] Everywhere in the country (except in New York City) the papers are fully returnable, and the Audit Bureau of Circulation does not give substantial credit for copies of newspapers "eaten"[26a] by newsboys. The publisher must therefore see to it that as many of his papers as possible are disposed of by the newsboys' single-copy street sales. A newsboy, perhaps content with small sales, and who will not "hustle", finds that his services are no longer required.

These newsboys are far different from the "independent merchants" they are said to be, purely as a matter of law. The Board was justified in finding they are not independent as a matter of fact. Engaged as they are in performing the personalized service of rapid single-copy distribution of newspapers in the public domain, that is, on the public sidewalks, at fixed "spots" or corners, they are a normal group of workers, belonging to the same union,[26b] and doing their job continuously, year after year,

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[26] 12 World Book Encyclopædia 4954.

[26a] *Imperial Hearst, op cit.* pp. 295, 300.

[26b] The Congress of Industrial Organization newsboys' union involved in these cases is itself a striking example. These proceedings have been pending for almost five years. The petitions for investigation and certification of representatives pursuant to Section 9 (c) of the Act were dated April 18, 1939 (R. 3 et seq). The original dispute of course antedated the filing of the petitions.

for the same publishers. With no technical skill and no capital, they have nothing to sell or furnish except their labor and endurance. Their under-privileged status and subjection to physical and economic control mark them as a typical employee group.

THE DECISION OF THE CIRCUIT COURT OF APPEALS

(a) The Court Ignored the Services Performed by the Newsboys for the Publishers and under Their Complete Control as Dictated by the Necessities of this Unique Industry

From the foregoing analysis several unquestionable facts emerge. What is loosely referred to as the mere "sale" of a newspaper is really (1) the sale of paper and ink, (2) the distribution of news, and (3) the distribution of advertising matter. The transaction is further complicated by the fact that all three operations are carried on by the same process. As relevant to this case the distribution work involved in that process is done by the newsboys. The main product the publishers have for sale is advertising matter, which is not sold to or by the newsboys. The newsboys never derive one penny of salary, profit or other remuneration from the sale of the advertising; th

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of Berkshire Mills v. N.L.R.B., 139 F (2) 134 (C.C.A.3, Dec 1, 1943), where the court, the complaint having been issued Nov. 6, 1937, said (at p. 136) "This case bids fair for the unenviable distinction of being Jarndyce v. Jarndyce of labor law... The delay is — contrary to the express general policy of the Act."

they are not even "vendors"[27a] of the news.[27b] They are not "tradesmen" or "merchants"; they have no stock; they have no place of business; they are only assigned a place to work; they have no capital; they have no security; they work at the will or the whim of the publishers; in essence they have nothing to sell but their services.[27c]

The product actually "sold" (in the sense that there is a price charged for the papers to the boys, who then are paid, as a handy incentive device, by letting them keep the difference between that price and the price to the public) involves the public aspect of this business, to wit, the dissemination of news, and this formal "sale", as the publishers themselves have always contended, is the ren-

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[27a] It is significant that the press, comparatively recently, has universally applied this name or some other similar one, such as "news vendor", "corner owner", "corner operator" or "newsdealer", to persons making street single-copy sales of their papers. The word "newsboy" has practically disappeared from the editorial rooms, where brevity has always been a prime desideratum, and these longer, more dignified terms substituted.

[27b] When newspaper readers have a complaint about the service, the complaint is made to the publisher of the paper, and not the newsboy.

[27c] As the court observed in *Calumet Publishing Co. v. Chicago Tribune*, Appendix "H2",

> "it may be seriously questioned whether the transaction called in common parlance 'the sale of a newspaper' is a sale in the legal sense. An essential element in legal sales is the transfer of title in the commodity sold without a residuum of control of its use remaining in the seller. Can the purchaser of the news make unrestricted use of it? Of course not. The Associated Press and other newsgathering agencies would go out of business if every purchaser of a newspaper could reprint its contents and distribute it. No title passes to the printed material which alone constitutes the consideration for the payment of the purchase price."

dition of a public service, to which "sales" of papers are merely incidental.

There can be no objection to this analysis. Indeed the publishers have heretofore insisted upon it.[28] In these cases the publishers for obvious reason have chosen to ignore the realities inherent in the thing they do for the superficial and misleading nomenclature of "vendor-vendee". Indeed the Herald has belatedly made the discovery that its newsboys are "sales agents".

Now the complex of functions described above clearly shows that the newsboys perform, in their turn, a service in a double aspect; (a) the service of the dissemination of news, which is a service to the public as well as to the publishers; and (b) a service to the publishers alone in the distribution of the advertising matter.

It is respectfully submitted that the consequence of these facts, which constitute the bedrock reality in the industry, is that the boys are in no substantial sense, legal or otherwise, "independent". The fact that the newsboys are a vehicle for the rendition of these services shows (1) that the arguments based on the vendor-vendee relationship are untenable; and (2) that the right to control over the boys in the rendition of the service to the pub-

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[28] The publishers have uniformly urged and the courts have held that the sale of newspapers is essentially a service. The authorities are collected and the arguments presented in a brief filed by the publishers in Chicago in the case of *Calumet Publishing Co. et al. vs. Chicago Tribune, et al.*, where the question was whether persons engaged in the distribution of newspapers in Chicago were "persons engaged in the business of selling tangible personal property at retail" and therefore subject to the Illinois Retailer's Occupational Tax Act. Excerpts from the publishers' brief and the text of the opinion of the Court are made a part hereof as Appendices "H" and "H2", respectively.

lisher is necessarily retained by the publisher in his own interest, and, as this record shows, is in fact abundantly exercised, in detail. No independent merchant is subjected to any similar complete control.

We do not here contend that the fact that newsboys are instruments in the rendition of a service rather than retailers of a physical commodity alone establishes the status of employment. Conceivably the service rendered by the newspaper and the newsboy to the reader could be through an independent agency. But the facts in this case show that far from entrusting the promotional work and close supervision inherent in the distribution system here under scrutiny to outsiders, the publishers have jealously ~~retrieved~~ RETAINED those functions for themselves.

The court, in ignoring the above, shut its eyes to the most fundamental and operative facts in the industry, and inherent in the findings of the Board in this case, that the newsboys are employees of the publishers within the meaning of the Act.

(b) The Court's Approach to the Problem Was Unduly Narrow

The National Labor Relations Act purposed to end an era of bitter, prolonged and wasteful industrial strife. The coverage of the Act must be deemed to be as broad as the conditions which led to its enactment, and the remedies therein provided as coterminus with the industrial unrest intended to be removed. The Act recognized at long last that freedom of contract begins where inequality of bargaining power ends. The Congress, in its wisdom, prescribed collective bargaining to redress the balance. This Court held the prescription and the Act

well within the legislative power. Thereafter, the function of the courts,[29] as repeatedly defined by this Court, was limited.

But "statutory construction" was still available[30] as an exclusively judicial province, although a trial *de novo* was excluded. It is respectfully suggested that the Court of Appeals made an unwarranted use of the first and an unauthorized resort to the second. For while the court did make a perfunctory reference to the Act as being "in like manner" with "several" other "federal statutes • • • based upon a broad policy of public benefit,[31] it did not attempt to analyze the Act, or consider how it differs from the other federal statutes in question. Also, while making no reference to cases in state courts holding news-

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[29] Thirty-five years ago, Dean Pound said:

"To economists and sociologists, judicial attempts to force Benthamite conceptions of freedom of contract and common law conceptions of individualism upon the public of today are no less amusing—or even irritating—than legislative attempts to do away with or get away from these conceptions are to bench and bar. The nullifying of these legislative attempts is not regarded by lay scholars with the complacent satisfaction with which lawyers are wont to speak of it. They do not hesitate to say that 'the judicial mind has not kept pace with the strides of industrial development'. They express the opinion that 'belated and anti-social' decisions have been a fruitful cause of strikes, industrial discord, and consequent lawlessness." Pound, *Common Law and Legislation*, 21 Harvard Law Review at 384.

[30] "There are two ways in which the courts impede or thwart social legislation demanded by the industrial conditions of today. • • • The second is a narrow and illiberal attitude toward legislation conceded to be constitutional, regarding it as out of place in the legal system, as an alien element to be held down to the strictest limits and not to be applied beyond the requirements of its express language." Pound, *ibid.*, p. 385.

boys to be employees for various purposes, it did cite state cases holding they were not employees for those various purposes, as exemplifying the rules determinative of the relationship of master and servant, (not that of employer and employee) as those rules are stated in Corpus Juris.[32]

The Circuit Court also relied upon Webster's New International Dictionary[33] as a guide to the meaning of the word "employee" within the meaning of the National Labor Relations Act.

But the court left out of consideration entirely the history, purpose and structure of the very Act to be construed. It regarded the word "employee" as taking no "color from its surroundings", and held that the statute, so far from affecting the approach to the problem,[34] must be entirely excluded from consideration. This result seems grounded only in a latent and perhaps unconscious hos-

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[31] Citing two cases decided by this Court in 1915 and 1920, respectively.

[32] In holding there was no substantial evidence here in these cases to support the Board's finding of the requisite status, the Court suggested a comparison with a newsboys' certification case arising in Houston, Texas, where the Board, there being no street circulation department maintained by the publisher, found the newsboys there were not under or subject to the publisher's control, and hence not its employees.

[33] The first dictionary definition of employee cited by the court is "one employed by another". That is sufficient to cover this case. The second definition makes the relationship dependent on "wages or salary" derived in the service of the employer, without any definition of what constitutes salary or wages. It has not been true for a long time, even as a matter of judicial decision, that the relationship depends on the form the compensation for service takes.

[34] Cf. *Ross vs. Post Publishing Co.*, 129 Conn. 564, 29 A. (2) 768 (1943).

tility to the purpose of the Act, although the court appeared to say it was aware of its broad policy.[35] By excluding this class from the coverage of the Act, thus denying to persons who constitute, on the facts, a classic example of the kind of person obviously intended to be one of the special objects of the legislative solicitude,[36] the court, in effect, construed the Act as if in obedience to the "ancient" rule that statutes in derogation of the common law are to be strictly construed.[37]

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[35] "Courts are fond of saying that they apply the old principles to new situations. But at times they must apply new principles to situations both old and new. The new principles are in legislation. The old principles are in common law. The former are as much to be respected and made effective as the latter—probably more so as our legislation improves. The public cannot be relied upon permanently to tolerate judicial obstruction or nullification of the social policies to which more and more it is compelled to be committed." Pound, *ibid.*, at 406, 407.

[36] Cf. *Lehigh Valley Coal Co. v. Yensavage*, by L. Hand, J. (C. C. A. 2, 218 Fed. 547; cert. denied, 235 U. S. 705, 35 Sup. Ct. Rep. 282):

> "The word 'employed' * * * must be understood with reference to the purpose of the act and where all the conditions of the relation required protection, protection ought to be given. * * * Such statutes * * * should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them."

[37] "The proposition that statutes in derogation of the common law are to be construed strictly * * * assumes that legislation is something to be deprecated. As no statute of any consequence dealing with any relation of private law can be anything but in derogation of the common law, the social reformer and the legal reformer, under this doctrine, must always face the situation that the legislative act which represents the fruit of their labors will find no sympathy in those who apply it, will be construed strictly, and will be made to interfere with the *status quo* as little as possible." Pound, *ibid.*, p. 387.

The Board approached the problem of the inferences to be drawn from the facts in the light of the pervasive purpose of the Act, and was guided and informed by the experience gleaned in its administration. The finding that the newsboys were employees, was grounded in the recognition that the word "employee" must be viewed in its "conventional" as well as in its legal sense. The court said it too was defining the word "employee" in the "conventional" sense, but obviously the court meant the conventions of judicial decisions antedating the Act to be construed, whereas the Board meant the customs [38] in the industry to which the Act was being applied, and in the common understanding of the position of the newsboys, as persons who in all respects were intended to be beneficiaries of the remedial and ameliorative provisions of the Act.

The court's rejection of the administrative view of the detailed control exercised as an element showing the basic function of the newsboys as employees "in a realistic economic sense" in an industrial enterprise, in favor of the "conventional" [39] meaning of the word "as devel-

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[38] The Board in its statement of facts mentioned that there was a history of collective bargaining, although no contracts had been made between the parties. It is submitted that the fact that the parties before the Board themselves had chosen to engage, in their industrial relations, in the very course of conduct required by the Act is significant in solving the question the Board had before it.

[39] The dictionary meanings of "conventional" conceivably pertinent are: "Formed by agreement or compact; stipulated; contractual; —opposed in law to legal and judicial. Growing out of, or depending on, custom, or general agreement; established or sanctioned by general concurrence or usage; formal." Webster's New International Dictionary (2nd Ed. 1939)

oped under the common law and statutory enactments" at the time the statute was enacted, is weighted with the deadening implication that a nostalgic step backward can be helpful in giving effect to the broad purpose of the Act. Common law rules, isolated from the Act, or from any concrete case, are easy to state but hard to apply. The administrative ruling simply placed the newsboys in the context of the Act being administered,[40] and is more certainly and more readily comprehensible and practicable than the rule laid down by the court. But in any event the Congress confided to the Board and not to the court the function of finding the facts and of inferring therefrom, as a matter of administration, the persons to be covered thereby.[41] Unless the Act itself is to be read out of the law applicable to these cases, the Board and not the court is the tribunal better qualified[42] to decide the question. To adopt the lower court's view of the Board's function (or lack of it), would import into the Act that balkanization which has been the fate of the employment

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[40] "We recognize that legislation is the more truly democratic form of law-making. We see in legislation the more direct and accurate expression of the general will. We are told that law-making of the future will consist in putting the sanction of society on what has been worked out in the sociological laboratory. That courts cannot conduct such laboratories is self evident." Pound, *ibid.*, p. 406.

[41] Indeed, judicial review of administrative determinations, particularly in certification of collective bargaining representatives, is not something which "inheres in nature". Cf. *Switchmen's Union of North America vs. National Mediation Board*, 13 L. R. R. 382 (Nov. 22, 1943).

[42] "• • • courts are less and less competent to formulate rules for new relations which require regulation. They have the experience of the past. But they do not have the facts of the present." Pound, *ibid.*, p. 403.

concept in the courts, and would reduce the status of the Board to that of a lay jury, or lower. Such a view would deprive the Board's rulings of the weight normally to be attributed to those of an expert and policy-making as well as fact-finding tribunal. Judicial review amounting to a trial *de novo* in this context would *in limine* render the plain purpose of the Act and the function of the Board in this area nugatory or illusory, as the long history of these proceedings shows. It was not the intention of the Congress to convert the question of what constitutes an "employee" into a jurisdictional fact to be re-examined by each court throughout the nation at the instance of any party who might choose to litigate the question.[43]

The publishers too, argued for the "conventional meaning" of "employee". But they too apparently meant the customs of judicial decision, while the Board meant the customs of industry. The Court, feeling free to choose, chose the former interpretation, thus itself adding to the very judge-made customs upon which it was relying. But an approach to the problem "in the light of the mischief to be corrected and the end to be attained"[44] presupposes the "custom" of popular action and not the "custom" of judicial decision.[45]

In the newspaper industry these newsboys are treated in an intensely practical way. The question is not whether they are in all respects within a formal framework and subject to every conceivable incident of the employment rela-

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[43] *Schantz vs. American Dredging Co.*, 138 Fed. (2) 534, at 536, 537.

[44] *Warner v. Goltra*, 293 U. S. at 155, 55 Sup. Ct. Rep. 46 (tugboat master *held* "seaman" for purpose of Merchant Marine Act).

[45] "Formerly it was argued that common law was superior to legislation because it was customary and rested upon the consent of the governed. Today we recognize that the so-called custom is

tionship at common law, but rather whether a sufficient number of the factual incidents of the relationship appear, from which the inference of employment for the purpose of the Act could reasonably be drawn.

Certainly no one in the industry actually treated these men as "independent contractors" or "independent businessmen", and no one referred to them in that way, except ironically, or by advised and purposeful designation. And certainly they are, in the dictionary, "conventional" sense, "employed" by the publishers in the rapid single-copy street distribution of the newspapers, the sale thereof being a mere incident to that service and the method of compensation merely another familiar example of payment by piecework, with all that method of payment implies.

It is submitted that the court's reliance upon its own concept of "conventional" in this field and in this industry, as opposed to the finding of the Board, which had several times passed on it,[46] was manifest error.

(c) The Court Brushed Aside the Findings and Usurped the Functions of the Board

The various aspects of the part played by the newsboys in the highly articulated system of distribution of

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a custom of judicial decision, not a custom of popular action." Pound, *ibid.*, at p. 406.

[46] ~~It is submitted that the court's reliance upon its own finding of what is "conventional" instead of the convention in this field and in this industry, which~~ is the sense ~~in which the Board used the word, was manifest error.~~ On this point the court quoted from the Board's opinion as follows: "the term 'employe' embraces all employees in the conventional as well as legal sense." (136 Fed. (2) at 612) See also, *Matter of the Constitution Publishing Co.*, 29 N. L. R. B. at 112; *Matter of Seattle Post-Intelligencer Department of Hearst Publications, Inc.*, 9 N. L. R. B. 1262.

news and advertising matter developed by the publishers should have been considered as a whole. But the court accepted the publishers' view that particular parts of the whole should be separated, regarded alone as the controlling factors, and the bulk and essence of the whole ignored. It is submitted, with deference, that the Board certainly was not bound so to isolate a part from the whole, to be bemused by tendentious argument about an ordinary "vendor-vendee" relation, and to shut its eyes to the newsboys' work, considered as a whole. On the contrary, having given effect to the over-all picture, its findings should have been sustained.[47]

The court said it found justification for substituting its own ruling for that of the Board in *United States vs. American Trucking Assn's.*[48] But that case does not afford the slightest support for the court's position. The question there was whether a clause in a statute should be construed to confer jurisdiction on the Interstate Commerce Commission, to the exclusion of the Wage and Hours Division, over *all* the employees of a common carrier. Such a holding arbitrarily would have excluded all employees, whether their duties were in promotion of safety of operation or not, from the benefits of the Fair Labor Standards Act. On that question no evidence was

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[47] Cf. the remarks of Cardozo, J. in *Glielmi vs. Netherland Dairy Company*, 254 N. Y. 60, 171 N. E. 906: "The contract is adroitly framed to suggest a different relation, but the difference is a semblance only, *or so the triers of fact might find.* * * * Much of his apparent freedom is in truth apparent only. * * * If he does anything at variance with the will of his employer, its policy or preference, he knows that his contract of employment may be ended overnight. He is bound hand and foot as long as he works the route at all, his freedom an illusion and his independence but a name."

[48] 310 U. S. 534, 60 Sup. Ct. Rep. 1059.

relevant; no administrative findings of fact could have been made to vary or interpret the question presented or the result reached. Since all the employees were admittedly employees of the carrier, no findings on the question of what constitutes an employee were involved. The court exercised an "exclusively judicial function".[49]

But it did become necessary for this Court, within that range of inquiry, to consider the meaning of the word "employee". It held the word is not a word of art, but takes color from its surroundings; that it is not a word of "definite content". Now the "content" of the word "employee" was there to be determined for the purpose of allocating jurisdiction over persons admittedly employees, between one agency and another. But the "content" of the word "employee" in the cases at bar is to be determined for the purpose of finding whether persons claimed to be independent contractors are within the coverage of the labor laws. The interpretation of the statute was there an exclusively judicial, not fact-finding function, and the opinion of this Court effectively ended the justiciable controversy; whereas in the cases at bar, the interpretation of the term used in the statute and the existence of the relationship itself is determined only by, and varies with, the facts in each case. But administrative fact-findings are conclusive if substantial evidence[50] sup-

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[49] Even so, the opinion of the agencies in question, as this Court there said, was entitled to great weight; yet the weight to be given those opinions in such cases is not at all comparable to the weight to be given administrative findings of fact within the doctrine of administrative finality. *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 59 Sup. Ct. Rep. 743.

[50] Actually, the findings made as to control justify, from this cold record, the frank statement that it was a control so complete as to approximate the status of the conventional servant of an earlier century.

ports them. And so the "content" of "employee" in the *American Trucking* case was primarily legal; the content of the same word in the cases at bar is primarily factual, and the facts found by the Board, upon which the administrative determination was predicated, were entitled to the weight the law assigns to them. The cases are thus readily distinguishable.

Of course, if the Board had erred in interpreting the intent of the Congress, or if its findings of fact had not been supported by substantial evidence, the position taken by the court below might have been comprehensible. But neither of these elements appeared; on the contrary, the intent was given its proper effect* and the findings of fact abundantly supported. The concept of employment is one without definite content. The result of the court's action is to reverse the direction of the Act, confining it within the most narrow limits possible. Certainly the Act was not given the treatment to be accorded what Dean Pound has felicitously termed "creative legislation".[51]

The consequent reversal of the Board by the majority of the court deprives many persons, held to be, *legally*, independent contractors, of the only economic weapons appropriate or available to persons of their status, and attributes to the architects of the Act an intention to create a limbo to which these persons and others similarly situated are assigned.[52] And this result is attained in disre-

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* See *infra*, subdivision (d).

[51] *Outlines of Legislation*, p. 10 (Harvard University Press, 1934).

[52] The publishers, when refusing to bargain collectively with the newsboys or to recognize the newsboys' right to organize, are accustomed to make the physically impossible and practically ineffective suggestion that they will always be glad to meet with *individual* newsboys to discuss mutual business problems—presumably the problems of whether and where the newsboy is to stand

gard of the findings of fact made and inferences drawn therefrom by the Board and without any compelling reason, either in law, in the Act [53] or in experience,[54] for reaching such a result. And this in an area in which this Court has recently held that judicial restraint must be exercised. See the Switchmen's cases, *supra*, note 41.

(d) The Court Below Declined to Give Any Weight to the History, Policy and Purpose of the Act Which This Court Has Found To Be a Valid Legislative Experiment in the Field of the Industrial Relations of the Nation

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The opinion of the Court of Appeals reflects an exoteric disregard of the customs prevalent in the newspaper industry, of the history and purpose of the legislation involved, and of the findings of the tribunal to which Congress confided the administration of the Act.

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on the sidewalks; when and for how long; how he is to display the papers; how hard he is to work or "hustle" or "pitch that sheet" or "work the white lines"; when he is to be "cut off" or discharged; and similar mutual business problems.

[53] "In our fifth case, friction between the terms of a statute and doctrines or principles of the common law, the case is otherwise. Here the legislator is within his own undoubted province, and his rules have the superior authority. Hence the courts could not entertain a suggestion that legislation contrary to the doctrines of the common law is invalid. Granting its validity, they have to consider whether they will interpret it liberally, giving full and free development to its policy and spirit, or narrowly and strictly, refusing to suffer any suspension or modification of the existing judge-made law beyond what the letter of the enactment dictates." Pound, *op. cit.*, p. 396.

[54] "Judicial law-making for sheer lack of means to get at the real situation, operates unjustly and inequitably in a complex social organization. One might find more than one illustration in the conflict between judicial decision and labor legislation. * * *

Rejecting the history of collective bargaining and industrial strife in this area of the newspaper industry, the court declined to receive the Act into "the body of the law as affording not only a rule to be applied but a principle from which to reason".[55]

The concept of employment under the Act is no more conventional than the Act itself is conventional.[55a]

"What court that passes upon industrial legislation is able or pretends to investigate conditions of manufacture, to visit factories and workshops and see them in operation, and to take the testimony of employers, employees, physicians, social workers, and economists as to the needs of workmen and of the public. * * *" Pound, *ibid.*, at pp. 404, 405.

[55] "Four ways may be conceived of in which courts in such a legal system as ours might deal with a legislative innovation. (1) They might receive it fully into the body of the law as affording not only a rule to be applied but a principle from which to reason, and hold it, as a later and more direct expression of the general will, of superior authority to judge-made rules on the same general subject; and so reason from it by analogy in preference to them. (2) They might receive it fully into the body of the law to be reasoned from by analogy the same as any other rule of law, regarding it, however, as of equal or co-ordinate authority in this respect with judge-made rules upon the same general subject. (3) They might refuse to receive it fully into the body of the law and give effect to it directly only, refusing to reason from it by analogy but giving it, nevertheless, a liberal interpretation to cover the whole field it was intended to cover. (4) They might not only refuse to reason from it by analogy and apply it directly only, but also give to it a strict and narrow interpretation, holding it down rigidly to those cases which it covers expressly. The fourth hypothesis represents the orthodox common law attitude toward legislative innovations. * * * But it is submitted that the course of legal development upon which we have entered already must lead us to adopt the method of the second and eventually the method of the first hypothesis." Pound, *op. cit.* at p. 385.

[55a] As has been pointed out, the court below confined this word to its meaning as defined in decided cases, none of which interpreted

If anything in the Board's concept comes with the shock of novelty and change to the common law lawyer, it is perhaps the same shock with which he views the new Act in its entirety.

In effect, the court below differed from the Board as to the application of the National Labor Relations Act to an entire segment of the national economy. But industrial turmoil was not, before 1935, and is not since, submissive to all the factitious requirements of any such doctrinaire concept of the employment relation. The reasoned basis of the Act is that our competitive system cannot properly function unless the parties to a bargain have a reasonable equality of bargaining power. That reasoning is fully applicable as between employer-and-employed,[56] and the present cases plainly constitute an occasion for the application of the established national policy in this regard. The concentration of wealth and power among individual publishers and in associations of many publishers (such

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a labor relations act. Conventionally considered, the word "employee" is not now deemed by the ordinary man as the equivalent of "servant". Millions of workers would indignantly deny their employers are their "masters", and would repudiate the application of the word "servant" to them, connoting, as it does, a servility characteristic of a rigid and stratified class society which is as foreign to the ethos of our industrial system or human philosophy as anything could be. Accordingly, the words "master" and "servant" are, currently, not even a part of our industrial vocabulary; only in the lawbooks do the terms appear as interchangeable with "employee" and "employer".

[56] "I have seen the suggestion made that the conflict between the employers and the employed is not competitive. * * * If the policy on which our law is founded is too narrowly expressed in the term of free competition, we may substitute free struggle for life." Mr. Justice Holmes, in *Vegelahn vs. Guntner*, 167 Mass. at 107, 44 N. E. 1077.

as the American Newspaper Publishers' Association) are not and cannot be paralleled by any even remotely similar aggregates of power among the newsboys. Moreover, in the national economy and in this industry, the newsboys are in no wise "tradesmen" or "merchants". Their association offers no threat of harm to the public. They have nothing to sell but their services. Publishers argue, and the courts and legislatures agree (Appendices "H" and "H2"), that newsboys do not and cannot "sell" the news, and certainly not the advertising; and that essentially they are engaged in the rendition of a service, *to* the public generally, in part, but specifically *for* the publishers. Since therefore all the newsboys have to dispose of is the personal service, they are able to render, all[37] they can combine for and bargain about are the terms and conditions of their employment by the publishers in the rendition of that service.

It is small wonder that no reason has been offered for excluding the newsboys from the coverage of the Act except the question-begging one that they are not employees within the meaning of the Act and were not intended to be. To support that view the publishers advance no argument based upon or derived from the Act, perhaps because, in its coverage provisions, the Act marks a significant mile-stone and a forward-looking guidepost in the process, begun at the turn of the century and intended, with a minimum of government intervention, to benefit precisely such men as these.

This is the first case in the entire complex of social legislation the past ten years has produced which presents to this Court the nature of the modern employment relationship. And at this late date the Court is urged to con-

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[37] Each newspaper's physical paper and ink is negligible in value, and in price, which is controlled by the publishers.

fine the coverage of the Act to a concept based on an agency relationship, derived from a petty economy, which *identifies* the master with his servant for the purpose of tort liability, and to disregard the *diversities* of interest implicit in the relationship, in a modern industrial society, with which Congress sought to deal for the purpose of peacefully reconciling those diversities. That is to say, the Court is asked to ignore the realities which inhere in the modern concept of employment in favor of the legacy of an outmoded handicraft economy.

Moreover, respondents have repeatedly insisted that the Board's developed administrative construction of the employment relationship must be disregarded because the common law of master and servant is asserted to be more precise. But this is, at best, a nostalgic appeal to the delusive exactness of a mere formula. As the Restatement of Agency expressly states, "The relationship of master and servant is one not capable of exact definition." (Section 220 (b)). The existence of the common law relationship depends in each case upon the imponderables and uncertainties inseparable from the process of "weighing factors" to determine whether in a given instance a sufficient number of common law elements of employment is present. This process has so balkanized the employment relationship in the courts as to make absurd the contention that a common law yardstick is a definite one.[38] To subordinate the plain purposes of the Act to all the niceties of the old master and servant relationship is to dis-

[38] The collision between industrial fact and legal theory has created a situation in which cases repeatedly arise and are now *sub judice* all over the country, as to what is an "employee" in street circulation departments in the newspaper industry, within the meaning of divers statutes, for divers purposes, and under divers sets of facts. The formula alone do not vary, but being dependent on the Macedonian salad of varying facts upon which the

regard sound standards of statutory construction; and the notorious uncertainty [39] and conflict which have resulted generally from the application of only common law standards hardly justifies engrafting any such archaic and static concept upon a pervasive and modern legislative innovation.

And surely, apparent symmetry and deceptive certainty may be abandoned, without regret, where reality, function and progress intervene.

Perhaps nothing more completely condemns the court's resort to the common law as a basis for determining who is an employee under the Act than the court's reliance upon *New York Indemnity Co. vs. Industrial Accident Commission*, 213 Cal. 43, 1 P. (2d) 12. In that case, the California Supreme Court on rehearing revers-

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existence of the relationship in each case turns, the formula are utterly meaningless until the last judge to whom appeal may be made has spoken. And with each differing set of facts, that process begins all over again. The only certainty emerging from those case histories is the certainty of prolonged and expensive court proceedings, often to the detriment of persons able neither to wait nor to pay. Should not the courts allow the full scope for which the legislature provided here in its attempt to adapt the rule of law "to the swiftly moving facts" of industry?

[39] "• • • the most cited leading case in the United States reached the California Supreme Court three times, and the court reversed itself twice within a year on the same facts. • • • .

"• • • in Pennsylvania's only case, the Workmen's Compensation Referee, the State Compensation Board, and a Judge of the Allegheny County Common Pleas Court found a newspaper boy to be an employee, whereas the highest court of appeal on this subject, the Superior Court, finally reversed them all. • • •"

The Newspaper Boy, Charles A. Rohleder, at p. 13.

The California case to which Mr. Rohleder refers is the *New York Indemnity* case discussed supra, the Pennsylvania case is *Balinski v. Press Pub. Co., et al.*, 118 Pa. Superior 89, 179 A. 897. That case was cited with approval by the Circuit Court of Ap-

ed its own well-reasoned decision in the same case (294 Pac. 707) upholding a workmen's compensation award to a newsboy. In its earlier decision, the court had held that the newsboy occupied a personal service relationship, but on rehearing the court found that the relationship was not one of personal service after all. The crux of the reversal is contained in language marked by an unusual but illuminating candor:

> "The petitioners herein, both through their counsel and through the aid of amici curiae, have presented much plausible argument as to the effect of upholding the legal conclusion and award of the commission upon the numerous army of more or less irresponsible persons of immature years, of physical infirmities, and of failures in other vocations, who come at length within the classification of newsboys in the farflung daily or periodical distribution of newspapers and other periodicals to the public at large. The impossibility in the main of exercising any more than a very limited supervision or control over this

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peals, which, like the Superior Court of Pennsylvania, conceived its duty to be to substitute its own views for the administrative views as to the fact of employment under statute. But in another Pennsylvania Compensation case, Pennsylvania's Court of last resort, the Supreme Court, took precisely the opposite view of the judicial function. In a *per curiam* opinion, the Court said:

> "Per Curiam.
>
> The only question before the referee and the compensation board, which was one of fact, was as to the relation which the husband of the appellee sustained to the appellant at the time he was killed. The finding of the board was that he was an employee, and not an independent contractor, as the defendant contended. This finding is conclusive: Messinger v. Lehigh Valley R. R. Co., 261 Pa. 336.
>
> Appeal dismissed and award affirmed."
>
> *Belmonte v. Connor*, 263 Pa. 470, 106 A. 787.

promiscuous and ever-changing body of assorted individualities occupied from day to day in the vocation known by the title of "newsboys" has been plausibly urged as a reason why the legislature in the adoption and limited application of the Workmen's Compensation Act could not have intended to embrace within its terms this promiscuous and in a sense large irresponsible class of persons, and that to impose upon the publishers of newspapers and other periodicals responsibility for their individual mischances while pursuing such vocation would work disaster to a very large number of persons who now receive a measure of their livelihood in the retailing of newspapers and other publications, but with respect to whom such publishers could not in reason be held to assume the responsibilities arising out of the established relation of employer and employee."

It is plain that whether or not a publisher is so situated with respect to his newsboys as to diminish their exposure to industrial risks has no ascertainable relevance to the issue of whether he should be required to bargain with them. Moreover, it is difficult to understand the pertinence, in the present context of the fact, even if true, that newsboys are subject to "physical infirmities" and are "failures in other vocations." And surely any assertion that the newsboys involved herein are "more or less irresponsible persons of immature years" or a "promiscuous and ever-changing body of assorted individualities" would, on this record and for the purpose of this case, be both inaccurate and immaterial. Finally the asserted immaturity and irresponsibility of the newsboy which was said legally to justify defeating a workmen's compensation award can hardly furnish a ground for terming him, legally, an independent merchant, as the court below did.

CONCLUSION

(1) The newsboys, viewing their work and status as a whole, are employed by the publishers.

(2) They are the personalized and final link in a chain of distribution; they function as the last integral part of a highly developed system of rapid single-copy street distribution of news and advertising matter, and perform this service primarily and directly for the publishers, and under their complete control. The speed and volume pivotal in that system are so guaranteed.

(3) The essential service aspect of the newsboys' work renders the "sales" aspect thereof irrelevant. The service is the substance; the "sale" the form.

(4) The findings of the Board are supported by substantial evidence.

(5) The Board observed and applied the appropriate rules to the facts upon which the existence of the relationship was predicated.

(6) The industry has a long history of newsboy union organization, of collective bargaining between newsboys' unions and publishers, and of industrial strife, paralleling the familiar wasteful pattern which led to the enactment of the statute the Board administers.

(7) The denial to the newsboys of employment status under the Act would defeat its purpose in this regard and deny all meaning to the history of organization, collective bargaining and contractual relations which the Act was intended to protect and foster, and would promote the industrial strife the Congress intended to remove.

(8) The court below relied upon, at best, inconclusive and isolated facts, and the barren holding is expressly as-

serted to be deduced from rules antedating the Act—rules inconsistent with and irrelevant to its history and purpose.

(9) The holding appealed from assigns no weight to the administrative findings and conclusions, and arbitrarily usurps the function of the Board, with the result that a substantial and underprivileged section of our economy are excluded from the benefits of the very Act of Congress obviously designed and peculiarly appropriate for their protection.

Respectfully submitted,

ARTHUR W. A. COWAN,

Attorney for International Printing Pressmen and Assistants' Union of North America, A. F. L.

APPENDIX "A"

LOCAL UNIONS OF NEWSBOYS, VENDORS, CARRIERS, DISTRIBUTORS AND CIRCULATION WORKERS CHARTERED BY THE I. P. P. & A. U. OF N. A. FROM THE OFFICIAL DIRECTORY OF THE INTERNATIONAL PRINTING PRESSMEN AND ASSISTANTS' UNION OF NORTH AMERICA, A. F. L., OCTOBER 16, 1942

Chicago, Ill.—Newsboys' and Carriers' Union No. 451.
Cincinnati, Ohio—News Carriers No. 311.
Des Moines, Iowa—Newsboys' and Carriers' Union No. 383.
Minneapolis, Minn.—Newsboys' Union No. 397.
Minneapolis and St. Paul, Minn.—Carriers' Union No. 401.
New York, N. Y.—Newsboys' Union No. 471.
Norristown, Pa.—Newsboys' Union No. 428.
Philadelphia, Pa.—Newsboys' No. 473.
Portland, Oregon—News Vendors' Union No. 396.
St. Louis, Mo.— Paper Carriers No. 450.
San Diego, Calif.—Newsboys & Carriers No. 446.
Baltimore, Md.—Circulation Distributors No. 503.
Houston, Texas—Circulation Distributors No. 460.
Houston, Texas—Newsboys' Union No. 456.
Memphis, Tenn.—Newspaper Distributors No. 399.
Perth Amboy, N. J.—Newspaper Circulation Workers No. 475.
Pittsburgh, Pa.—Branch Managers, News Dealers, Distributors and Circulation Employees No. 414.
Utica, N. Y.—News Distributors No. 437.
Atlanta, Ga.—News Carriers and Distributors No. 501.
Atlanta, Ga.—Atlanta News Carriers and Circulation Workers No. 445.

Appendix "A"

Atlanta, Ga.—Allied Newspaper Workers No. 470.

Augusta, Ga.—News Carriers and Circulation Workers No. 480.

Kansas City, Mo.—News Carriers and Distributors No. 499.

San Francisco, Calif.—Newspaper Periodical Vendors and Distributors No. 468.

San Jose, Calif.—News Carriers and Distributors No. 461.

Cleveland, Ohio—Shopping News Carriers No. 379.

East Bay Cities, Calif.—Shopping News and Circulation Carriers Union No. 417.

Los Angeles, Calif.—Advertising Distributors Circulation Workers No. 463.

Philadelphia Suburbs, Pa.—Suburban Carriers No. 484.

San Francisco, Calif.—Mission Carriers Union No. 453.

Chicago, Ill.—Community Newspaper Carriers and Distributors No. 469.

San Diego, Calif.—Circulation Workers No. 422.

Wichita, Kansas—Newsboys' Union No. 502.

APPENDIX "B".

"AMERICAN FEDERATION OF LABOR
Washington, D. C.

March 25, 1943

Mr. Arthur W. A. Cowan
Liberty Trust Building
Philadelphia, Pennsylvania

Dear Mr. Cowan:

The information transmitted to you herewith may be cited to the Court and is derived from the official records of the American Federation of Labor.

AMERICAN FEDERATION OF LABOR RESEARCH AND INFORMATION SERVICE

Unions of Newsboys, Carriers and Distributors Directly Affiliated with the American Federation of Labor

Name of Union	*Company & Location*
Newspaper Carriers Union 14712	Jewish and other Newspapers in Philadelphia, Pa.
Newsboys' Union No. 5834	Seattle Times Seattle Star Seattle Post Intelligencer Seattle, Washington
Newspaper Carriers Union 17785	Newspapers in Malden, Mass.
Federal Labor Union 21332*	Newspapers in N. J., Pennsylvania & vic.
Federal Labor Union 20786	Newspapers in Pittsburgh, Pa.

Appendix "B"

Name of Union	*Company & Location*
News Dealers and Carriers Assn. 21375*	Newspapers in Philadelphia, Pa.
Newspapers and News Distributors Office Workers No. 21345	St. Louis, Mo.

Please do not hesitate to let me know if you need any further data to assist you.

Very truly yours,
William Green, *President*
American Federation of Labor"

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*"AMERICAN FEDERATION OF LABOR
Washington 4, D. C.

January 21, 1944

Mr. Arthur Cowan
238 South Thirteenth Street
Philadelphia, Pennsylvania

Dear Mr. Cowan:

Federal Labor Union 21332 and Newsdealers and Carriers Union 21375 have transferred to the International Printing Pressmen's Union in November and October, 1943 respectively.

If I can be of further assistance, kindly let me know.

Very truly yours,
(sgd.) Wm. Green,
President,
American Federation of Labor"

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APPENDIX "C"

Newspaper Minimum Wage Scales, Hours and Working Conditions
of
Subordinate Unions of the
International Printing Pressmen and Assistants' Union
of North America

October 1, 1942

This document is prepared by the Service Bureau of the International Printing Pressmen and Assistants' Union, and is intended only for the use of International Union Representatives and Subordinate Union officers and Scale Committees

Atlanta, Ga. P. 445. Population 302,288.
News Carriers and Circulation Employees.
Constitution Publishing Company
Contract: June 2, 1941 to June 2, 1944.
Notice: 60 days prior to expiration or June 2, 1945. Circulation employees, wage scale openable 60 days prior to any anniversary date.

Scale:	Per Week
District supervisors	$35.00
Car allowance: $10.00 per week additional.	
Newspaper carriers: When home delivered circulation is:	Weekly purchase price of paper to carrier is
44,539 copies	$0.1600
46,833 copies	0.1575

49,350 copies	0.1350
52,500 copies	0.1325
56,000 copies	0.1500
59,500 copies	0.1475
63,070 copies	0.1450
66,223 copies	4.1425
69,534 copies	0.1400

Where news stands are handled by carriers, $0.07 per copy shall be paid the publisher for all collections made.

Advertising and promotional matters: Permitted.

Free subscriptions: Upon demand, carriers shall make such deliveries at $0.025 per week bonus per copy.

Transfer of Routes: Carriers, permitted if new route has 25 or more papers than transferor's route.

Atlanta, Ga. P. 501.

Carriers and Distributors.

Atlanta Journal Publishing Company **(Journal)**.

Contract: November 3, 1941 to November 3, 1944.

Notice: 60 days prior to expiration or November 3, 1945. Wages, 60 days prior to May 3, 1943.

Hours: 40-hour week.

Scale:	Day or Night
District Managers:	
First 6 months	$25.00
Second 6 months	27.50
Second year	30.00
Third year	33.00
Fourth year	36.00
Thereafter	39.00

Relief men: District manager's scale after 30 days.

Vacations: 1 week with pay.

Appendix "C"

Chicago, Ill. P. 469.

Newspaper carriers and distributors.

Contract: May 20, 1940 to May 20, 1942. Continued.

Notice: 60 days prior to expiration or any anniversary date thereafter.

Cincinnati, Ohio. P. 311. Population 455,610.

News Carriers.

Contract: Verbal agreement.

Scale:

	Commission
$0.03 papers	$0.01
0.10 papers	0.03

Post: 3% additional commission on collections.

Times-Star: 5% additional commission on collections.

Cleveland, Ohio. P. 379. Population 878,336.

Shopping News Carriers.

Contract: May 19, 1936 to May 19, 1939. Continued by agreement.

Notice: 60 days prior to expiration.

Hours: Average, 6-9 per week.

Bulldog delivery: 3-7 p. m.

Morning delivery: 5-9 a. m.

Scale:

Class "A" carriers: $0.95 per delivery.

Class "B" carriers: $0.85 per delivery.

$0.10 additional when paper runs over 20 pages.

Deliveries per week: Minimum of 2.

Des Moines, Iowa. P. 383. Population 159,819.

Newsboys and Carriers.

Contract: December 18, 1939 to December 18, 1941. Continued.

Appendix "C"

Scale:

Commission $1.33 per 100 sales

Yearly bonus: (paid weekly).

Full-time corner salesmen $130.00

Outside corner salesmen 78.00

Inserts: Prohibited.

East Bay Cities, Calif. P. 382.

Circulation Workers.

Berkeley Gazette Publishing Co.

Contract: June 28, 1940 to June 27, 1941. Continued.

Hours: 40-hour week.

Overtime: Time and one-half.

Scale:	Per Week
Assistant circulation manager	$36.00
Second assistant circulation manager	26.00
Third assistant circulation manager	26.00

East Bay Cities, Calif. P. 417.

Shopping News and Circular Carriers.

Berkeley Gazette Distributing Company

Contract: June 28, 1940 to June 27, 1941.

Notice: 30 days prior to expiration or any anniversary date thereafter.

Scale:

Carriers, Flat guarantee of $0.60 per month.

One delivery, one piece:

$0.30 per hour, $0.75 minimum.

One delivery, two pieces:

$0.25 bonus per piece.

One delivery, more than 16 standard pages:

$0.25 bonus.

Appendix "C"

If less than 4 deliveries a month, $0.25 paid for each delivery less than 4.

Supervisors:

One delivery:
$0.50 per hour, $1.50 minimum.

Two deliveries:
$1.00 bonus.

If less than 4 deliveries a month, $1.00 paid for each delivery less than 4.

Car allowance: $1.25 per delivery.

East Bay Distributing Service; Rapid Distributing Co.
Contract provisions same as **Berkeley Gazette Distributing Company** except for varying effective contract dates.

Kansas City, Mo. P. 499. Population 399,178.

Newspapers Carriers and Distributors.

South-West News Company.

Contract: November 3, 1941 to November 3, 1942.

Notice: 60 days prior to expiration or any anniversary date thereafter.

Hours: 40-hour 5-day week. Female employees, maximum 9-hour day.

Scale:	Per Week
Male employees:	
First 4 months	$16.00
Thereafter	18.00
Female employees:	
First 4 months	15.00
Thereafter	17.00

Overtime: Time and one-half, 2 hours additional permitted on any 2 days in the week at straight time rates.

Holidays and Sundays: Holidays, time and one-half.
Vacations: After 1 year, 1 week with pay.

Kansas City News Distributors.

Contract provisions same as **South-West News Company,** except:

Contract: May 8, 1942 to March 1, 1943.

Scale:	Per Week
Male employees:	
First 4 months	$18.00
Thereafter	22.00
Female employees:	
First 4 months	17.00
Thereafter	21.00

Los Angeles, Calif. P. 463. Population 1,504,277.

Advertising Distributors and Circulation Workers.

East Los Angeles Distributing Co.

Contract: June 28, 1940 to August 31, 1941. Contracts with same provisions but varying dates are effective for other distributing companies.

Notice: 30 days prior to expiration or any anniversary date thereafter. Wages, any 30 days.

Hours: Truck drivers, 8-hour day.

Scale: In negotiation.

Distributors:

Papers, 20 pages or less: $2.00 per thousand.
Over 20 pages: $2.25 per thousand.
Expense allowance in addition where necessary.

Truck drivers: $4.00 per day.

Reporting for Work: Minimum of 2 hours' pay at $0.40 per hour.

Appendix "C"

Memphis, Tenn. P. 399. Population 292,942.

Newspaper Distributors.

Contract: September 15, 1941 to September 15, 1942.

Notice: 90 days prior to expiration.

Effective date of scale: September 15, 1941.

Hours: 40-hour week. City District Managers, 40-hour 5-day week.

Scale:	Per Week
City District Manager, Street Sales Manager, and Country Circulation Traveling Representatives:	
First year	$21.00
Second year	24.50
Third year	27.50
Fourth year	32.50
Country Circulation Town Representatives:	
First year	17.50
Second year	19.00
City Complaint Men	10.00

Dismissal Pay: One week's pay for each 8 months' employment up to a maximum of 24 weeks pay. If dismissed within 6 months after last vacation, 1 additional week's pay; if dismissed more than 6 months after last vacation, 2 additional weeks' pay.

Expense Allowance: City District Managers, $7.00 per week plus $5.00 for bundle delivery; Country Circulation Traveling Representatives, $20.00 per week; City Complaint Men, $2.50 per week, Street Sales Managers, $2.50 per week plus $2.50 for bundle delivery.

Overtime: Time and one-half.

Vacations: After 6 months, 1 week with pay; after 1 year, 2 weeks with pay.

Appendix "C"

Minneapolis and St. Paul, Minn. P. 401.

Population of Minneapolis and St. Paul, Minn. combined 780,106.

Shopping News Carriers.

Contract: November 1, 1940 to November 1, 1941. In negotiation.

Notice: 60 days prior to expiration or any anniversary date thereafter.

Effective date of scale: November 1, 1939.

Scale:

Class "A" carriers: $0.85 per delivery.
Class "B" carriers: $0.75 per delivery.
$0.10 per hundred for extra circulars.

Inserts: Permitted. $0.10 per hundred.

Holidays and Sundays: All holiday deliveries before 12:00 o'clock, paid for at rate of $0.15 extra per delivery.

Perth Amboy, N. J. P. 475. Population 41,242.

Newspaper Circulation Workers.

Contract: May 15, 1942 to May 15, 1944.

Notice: 30 days prior to expiration or any anniversary date thereafter. Wages, 30 days prior to any anniversary date.

Hours: 40-hour 6-day week.

Scale:	Per Week
Supervisors:	
First year	$26.00
Second year	28.00
Third year	30.00
Fourth year	32.00
Fifth year	34.00
Thereafter	36.00

Appendix "C"

District managers:	
First year	21.00
Second year	22.00
Third year	23.00
Fourth year	24.00
Fifth year	25.00
Branch managers:	
First year	18.00
Second year	20.00
Third year	22.00
Fourth year	23.00
Fifth year	24.00
Clerks:	
First year	17.00
Second year	18.00
Third year	19.00
Fourth year	20.00
Fifth year	21.00

Supervisors managing branches: $5.00 additional.

Part-time branch managers: $0.45 per hour; minimum, 22 hours.

Overtime: Time and one-half.

Holidays and Sundays: Overtime rate.

Vacations: After 1 year, 1 week with pay. Six months to 1 year, 3 days with pay.

Red Bank, N. J. Population 10,974.

Contract: January 26, 1941 to January 26, 1942.

Hours: 40-hour 5½-day week.

Scale:	Day
Circulation managers and circulation solicitors	$17.00

Part time employees working 20 hours or less: $0.35 per hour. Car allowance: $0.04 per mile.

Overtime: Time and one-half.

Holidays and Sundays: Time and one-half.

Reporting for work: Day's pay.

Phoenix, Ariz. P. 472. Population 65,434.

Newsboys and Carriers.

Contract: August 1, 1941 to July 31, 1944.

Notice: 60 days prior to expiration or any anniversary date thereafter.

Scale:	Commission per paper
Daily or Sunday	$0.025

Inserts: Prohibited, except at publisher's request.

Pittsburgh, Pa. P. 214. Population 669,817.

Branch Managers, News Dealers, Distributors, and Circulation Employees.

Contract: November 3, 1941 to November 2, 1942.

Notice: 60 days prior to expiration.

Hours: 48-hour 6-day week.

Scale:	Per Week
City Home District Salesmen using own car	$43.50
City Home Delivery Salesmen using own car	38.50
City Home Delivery Sales Supervisors	38.50
Suburban Salesmen	35.00
City Home Delivery District Salesmen	32.30
City Home Delivery Salesmen	29.00

Appendix "C"

City and Home Delivery Salesmen	25.50
City Suburban Verifiers	25.50

Dismissal Pay: After 6 months, one week's pay.

Overtime: Actual time worked based on average hourly rate.

Portland, Oreg. P. 345. Population 305,394.

Inserters.

Contract: In negotiation.

Hours: 40-hour 5-day, 37½-hour 5-night week.

Scale:	Day or Night
Inserters	$30.00
Helpers	18.00

Overtime: Time and one-half.

Holidays and Sundays: Regular rates.

Portland, Oreg. P. 396.

News Vendors.

Contract: September 27, 1940 to September 27, 1941. In negotiation.

Notice: 30 days prior to expiration or September 27, 1942.

Hours: Minimum of 5 days per week.

Scale:	Commission
Daily newspapers:	
Retailing at $0.05	$0.02½ per copy
Retailing at $0.03	0.01½ per copy
Retailing at $0.02	0.01 per copy
Sunday newspapers:	
Retailing at $0.10	0.06½ per copy

Appendix "C"

San Diego, Calif. P. 422. Population 203,341.

Newspaper Circulation Workers.

Contract: May 26, 1941 to September 30, 1942.

Notice: 30 days prior to expiration or any anniversary date thereafter.

Hours: Filing, billing, mailing, office, counter and junior office clerks, full-time office boys and cashiers: 40-hour 5-day week. Circulators and assistants, route men, district managers and relief men: 6-day week, **Tribune-Sun**, city agent distributors: 30-hour 6-day week.

Effective date of scale: May 26, 1941.

Scale:	Per Week
Circulators, **Tribune-Sun**	$27.50
$0.05 bonus per 100 copies sold.	
Assistants, **Tribune-Sun**	20.00
$0.025 bonus per 100 copies sold.	
Circulators, **Union**	25.00
$0.15 bonus per 100 copies sold.	
Assistants, **Union** (Sunday work only)	5.00
$0.075 bonus per 100 copies sold.	
District Managers:	
First 6 months	22.50
Second 6 months	25.00
Second year	27.50
Third year	30.00
Fourth year	32.50
Fifth year	35.00
Sixth year	37.50
Over 6 years	40.00
Billing, filing, mailing, office and counter clerks:	
First year	18.50
Second year	20.00

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Third year	22.50
Over 3 years	27.50
Route men	18.00
City agent distributors, **Tribune-Sun**	12.50

Route men and **Union** circulators and assistant circulators receive $0.25 per shift bonus for night work.

Junior office clerks:

First 6 months	16.00
Second 6 months	17.50
Second year	18.50
Third year	20.00
Over 3 years	22.50

Part time clerks paid on an hourly basis ranging from $0.42 for the first 6 months to $0.60 for 3 or more years of service.

Cashiers	26.54

Full time office boys:

First 6 months	15.50
Second 6 months	16.50
Over 1 year	18.00

Dismissal pay: 1 week's pay for each 26 weeks' employment or major fraction thereof. Maximum of 26 weeks' pay.

Expense Allowance: Car allowance of $0.06 per mile for first 25 miles each day, and $0.03 per mile thereafter for circulators, route men, district managers, and distributors using personal cars on business. $6.00 per year for car insurance where required.

Vacations: After 6 months, 1 week with pay; after 1 year, 2 weeks with pay; except city agent distributors, after 6 months, 1 week with pay; after 2 years, 9 days with pay.

Appendix "C"

San Francisco, Calif. P. 416. Population 634,536.

Shopping News Carriers.

Contract: Verbal agreement, term indefinite.

Notice: 60 days prior to expiration.

Hours: Average 6-9 per week.

Bulldog delivery: 3-7 p. m.

Morning Delivery: 5-9 a. m.

Scale:

Class "A" carriers: $0.95 per delivery.

Class "B" carriers: $0.85 per delivery.

Deliveries per week: Minimum of 2.

San Francisco, Calif. P. 428.

Carriers Union

The Advertising Distributors.

Contract: June 10, 1941 to June 10, 1942.

Notice: 30 days prior to expiration or any anniversary date thereafter.

Scale:

Carriers: Flat guarantee of $0.60 per month.

One delivery, one piece:
$0.30 per hour, $0.75 minimum.

One delivery, two or more pieces:
$0.25 bonus per piece.

One delivery, more than 16 standard pages:
$0.25 bonus.

Supervisors:

One delivery:
$0.50 per hour, $1.50 minimum for each delivery.

Two deliveries:
$1.00 bonus.

Car allowance: $1.25 per delivery.

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San Francisco, Calif. P. 453.

Mission Shopping News Carriers.

Contract: July 31, 1941 to July 31, 1943.

Notice: 30 days prior to expiration or any anniversary date thereafter.

Scale:

Carriers	$0.80 per delivery
If delivery contains more than 16 standard pages	$0.25 bonus

If less than 4 deliveries a month, $0.25 paid for each delivery less than 4.

Supervisors	$2.00 per delivery

If less than 4 deliveries a month, $1.00 paid for each delivery less than 4.

San Francisco, Calif. P. 468.

Newspaper and Periodical Vendors and Distributors.

Contract: June 3, 1940 to June 3, 1942. In negotiation.

Notice: 60 days any time after April 3, 1942. Wages and hours, 60 days prior to June 3, 1941.

Hours: 46-hour 6-day week. Part time corners, 24-hour 6-day week.

Scale: In negotiation.

	Weekly Guarantee
Full time corner news vendor	$20.80
Part time corner news vendor	15.00
Vendors selling special wrapped editions or special event editions of one date only:	
Special wrapped	1/6 full time guarantee

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Special event	1/6 part time guarantee
Earnings, per hundred papers:	
Daily	$ 2.00
Sunday	3.00

Call back: 1/6 weekly part time guarantee with maximum of 4 hours' work.

Reporting for work: 1/6 weekly guarantee.

Ratio of Newsboys to Vendors:

Zone 1	3 to 5
Zone 2	2 to 1
Zone 2 (a)	13 to 1

APPENDIX "D"

CONTRACT
UNITED NEWSPAPER SELLERS AND CARRIERS OF AMERICA
Otherwise Known as
THE CLEVELAND NEWSPAPER VENDERS' UNION
and
THE SCRIPPS PUBLISHING COMPANY
THE PLAIN DEALER PUBLISHING COMPANY
and THE CLEVELAND COMPANY

This memorandum and these articles of agreement made and entered into at Cleveland, Ohio, on the 9th day of June, 1937, by and between UNITED NEWSPAPER SELLERS AND CARRIERS OF AMERICA, otherwise known as THE CLEVELAND NEWSPAPER VENDERS' UNION, a voluntary unincorporated association (hereinafter designated as the "Union"), for and on behalf of any and/or all of its members duly represented in the premises, and THE SCRIPPS PUBLISHING COMPANY, publisher of The Cleveland Press (hereinafter referred to and designated as the "Press"), THE PLAIN DEALER PUBLISHING COMPANY, publisher of The Cleveland Plain Dealer (hereinafter referred to and designated as the "Plain Dealer") and THE CLEVELAND COMPANY, publisher of The Cleveland News (hereinafter referred to and designated as the "News"), jointly and severally. Wherever the aforesaid Companies are hereinafter mentioned, they shall be designated as the "Publishers". Wherever one of the aforesaid Companies is hereinafter mentioned it shall be designated as "Publisher" or by its appropriate name aforesaid.

Appendix "D"

WITNESSETH:

That the parties hereto, for and in consideration of the terms, conditions, covenants, agreements and promises of each to the other hereinafter contained, mutually agree as follows:

1. That this agreement shall be in force and effect for a period of three (3) years, from the 9th day of June, 1937, or until the close of business on the 9th day of June, 1940, except that wages only may be opened for negotiation by the Union by notice in writing to the other party of the changes desired, said notice to be served not later than thirty (30) days prior to June 9, 1939.

1-A. If either party hereto desires to commence negotiations for a new contract to become effective upon the expiration date, it shall notify the other party in writing sixty (60) days prior to the expiration date, and accompany the notice with a copy of the proposed new contract. The respondent party may within twenty (20) days formulate a counter-proposal, setting forth the conditions it desires to incorporate, and negotiations shall commence within 5 days after the respondent party submits its counter-proposal. If no counter-proposal is filed, the existing contract shall be considered to be the respondent party's counter-proposal.

1-B. If notice is not given by either party, as above described, it shall be considered as a renewal of this agreement for one year. Nothing herein contained, except failure to give aforesaid notice, shall be construed to continue this contract beyond its expiration date until and unless mutually agreed to in writing.

2. The Publishers agree to supply members of the Union through their drivers or routemen with copies of their newspapers, and to classify locations as follows:

Appendix "D"

(a) *Four-hour Newspaper Sellers.* Four-hour newspaper sellers are defined as those who are required by the Publishers to work not to exceed four (4) hours on duty in one day, Saturday excepted, but this shall not include Plain Dealer midnight or first-edition newspaper sellers as hereinafter defined. The rate of compensation for non-guaranteed sellers shall be at the rate of One Dollar ($1.00) per hundred for the News, Press and daily Plain Dealer and Two Dollars ($2.00) per hundred for the Sunday Plain Dealer.

(b) *Six-hour Newspaper Sellers.* Six-hour newspaper sellers are defined as those who are required and so notified by the Publishers to spend more than four (4) hours, but not more than six (6) hours on continuous duty in any one day, between the hours of 12:00 o'clock noon and 8:00 o'clock p. m. on downtown corners, and between the hours of 12:00 o'clock noon and 10:00 o'clock p. m. on outskirts corners, but this shall not include Plain Dealer midnight or first-edition newspaper sellers as hereinafter defined. Such six-hour newspaper sellers shall be guaranteed a minimum earning of Twelve Dollars and Fifty Cents ($12.50) per week.

(c) *Night Newspaper Sellers.* Night newspaper sellers are defined as those who are required to sell the News or Press commencing at or after 6:00 o'clock p. m. and who shall sell continuously thereafter until not later than 12:30 o'clock a. m. Night newspaper sellers shall be guaranteed a minimum earning of not less than Nineteen Dollars ($19.00) per week.

(d) *Plain Dealer Midnight or First-edition Sellers.* Midnight or first-edition Plain Dealer sellers are defined as those who are required to sell the midnight, i. e., first-edition of the Plain Dealer from the time such edition is picked up and delivered until not later than 4:00 o'clock a. m. Plain Dealer midnight or first-edition newspaper

sellers shall be guaranteed a minimum earning of not less than Sixteen Dollars ($16.00) per week.

(e) *Full-time Newspaper Sellers.* Full-time newspaper sellers are defined as those (first) who are required to sell the Press or News commencing with the first edition thereof and continuously thereafter through the final edition, or between the hours of 10:30 a. m. and 9:00 p. m., but working time to be not more than 8½ continuous hours, except where they sell on night corners, then as to such night corners, full-time newspaper sellers shall sell not later than 6:00 p. m., and further excepted that full-time newspaper sellers on downtown corners where no night seller is stationed may remain on duty not later than 7:00 p. m.; (second) newspaper sellers purchasing morning Plain Dealers from routemen or from the Plain Dealer Publishing Company and who are required to sell continuously all editions, except the midnight or first edition, commencing at or after 4:00 o'clock a. m. and leaving off work not later than 11:30 o'clock a. m. Full-time newspaper sellers shall be guaranteed a minimum earning of not less than Nineteen Dollars ($19.00) per week.

(f) It is understood and agreed that there will be no splitting of corners, i. e., dividing any stated unit of hours hereinbefore specified between more than one seller in any of the classifications herein defined.

(g) It is understood and agreed that the Publishers shall have the right to transfer sellers from one corner to another within the same classification of minimum guarantee, but not from a corner the classification of which carries a higher minimum guarantee to a corner carrying a lower minimum guarantee, provided nothing herein contained shall modify the provisions of Section 5 of this contract.

3. A full-time seller working on one corner who services more than three other sellers shall be guaranteed Two

Dollars ($2.00) per week more than the minimum full-time guarantee. Sellers servicing any other seller, known as a helper, shall have the authority to hire and discharge such helper, provided that seller hiring a helper shall replace any such helper who for just cause is objectionable to the Publisher, upon notice from said Publisher. Sunday Plain Dealer sellers who service other sellers on Saturday night and Sunday morning shall continue to receive one-half cent commission per paper on papers supplied such other sellers, and such other sellers so supplied shall receive two cents (2¢) commission per paper on papers so supplied them. Sellers selling and service men servicing the Sunday Plain Dealer only shall be replaced as soon as is practicable by regular News or Plain Dealer sellers.

4. Newspaper sellers for the News who are now selling or who shall hereafter sell in addition to the News the Sunday Plain Dealer, shall be permitted to sell either or both, provided satisfactory compensation shall be arranged between such newspaper sellers and the News. It is further understood and agreed that if satisfactory compensation cannot be agreed upon, then such seller shall not be required to sell both the News and the Sunday Plain Dealer, but shall be permitted to continue selling the News.

5. The circulation manager or his representative shall at all times be the sole judge as to the number of corner locations in each classification hereinbefore defined in Section 2 of this agreement, or the changing of the classification of any location, and of any and all corner locations at which sellers may be stationed; provided that all guaranteed corner locations now or hereafter established shall be governed as to classification by the provisions of Section 2 of this contract and provided further that no classification of a corner location shall be changed by the Publishers unless and until prior notice of such change of not less than one week is given to the Union in writing. It is

understood and agreed that the President of the Union or anyone duly authorized by him shall at all times have the right to inquire and be informed as to the status of any corner location. It is further understood and agreed that for the purpose of determining corners where a full-time guaranteed seller is at present located a list of such corners will be furnished the Union at the time the contract is signed.

6. The circulation manager or his department heads shall be the judge of competency and shall have the right to hire and discharge upon the following grounds: Incompetency, dishonesty, being under the influence of liquor while on duty, disobedience of office rules of which the Union has been notified in writing, insubordination or neglect of duty.

7. All unsold papers shall be returned to the drivers or routemen delivering same.

8. Extra editions of any newspaper herein referred to may be sold by any and all newspaper sellers available for the purpose. Guaranteed sellers notified in advance by the circulation department of an extra to be run shall report at the newspaper plant or such location as may be designated by the circulation department, in ample time to receive such extras, and such guaranteed sellers so notified shall be guaranteed a minimum earning from the sale of such extras of not less than One Dollar ($1.00), irrespective of regular weekly earnings or guarantee. It is understood and agreed that earnings on the aforesaid guarantee from the sale of extras outside of regular hours shall be considered at all times apart from and not included in the minimum weekly guarantee or regular weekly earnings. It is further understood and agreed that no nonguaranteed seller shall be penalized or discriminated against in any way for inability or refusal to report for sale of extras. Extra editions issued during regular work-

ing hours as hereinbefore defined shall be sold by sellers on duty at the time such extras are issued without additional guarantee.

9. The Publishers will not, jointly or severally, directly or indirectly or through any of their drivers, routemen, other employees, or otherwise, by any means or device whatsoever, or through any inducements, financial or otherwise, attempt to influence the action of any newspaper seller that he join or remain in or refrain from joining or remaining in the Union, and will not discriminate against any newspaper seller for joining or belonging to the Union. The Union likewise agrees that it will not directly or indirectly through any of its officers or members by any means or device whatsoever interfere with the sale of the Publishers' newspapers in any manner, shape or form, provided that no member shall be required to expose himself to the danger of physical harm in the performance of his duties hereunder.

10. Nothing contained in this agreement shall prohibit or prevent any newspaper seller required to be on duty from leaving his location or corner for a reasonable length of time for the purpose of physical relief and for lunch time of not more than one-half hour per working day.

11. It is understood and agreed that no members of the Union shall sell or offer for sale any newspaper or newspapers on any basis of compensation less than the minimum herein agreed to for each classification.

12. No member or members of the Union shall engage in any walkout, strike or boycott, or interfere in any manner with prompt and regular publication, distribution of sales, or aid or encourage, directly or indirectly, such practices against the Publishers, individually or collectively, during the life of this contract or pending negotiations for

a new agreement, nor shall any member of the Union go out on sympathetic strike during the life of this contract.

13. It is understood and agreed that if a member of the Union on a guaranteed corner bootjacks, the time so spent shall be considered time spent performing his duties on the corner.

14. Any guaranteed seller who is a member of the Union and who shall hereinafter fail to keep his membership in the Union in good standing, upon ten (10) days' written notice from the Union to the Publisher, shall thereafter not be permitted to sell on a guaranteed corner unless such member is re-instated to the standing he had prior to such failure, and the Publishers hereby agree to recognize such failure and be bound thereby in the performance of this contract, and the Publishers further agree to employ only a Union member on such vacated corner.

15. It is understood and agreed that members of the Union on all guaranteed corners shall sell on holidays, if required; but substitutions by such members satisfactory to the Publishers, may be made on not less than three (3) days' notice to the driver or street boss. No payment shall be made for holidays or any other day or days on which no paper is published.

16. Publishers agree not to employ any sellers under fourteen (14) years of age.

17. It is understood and agreed that it shall not be the duty of any newspaper seller to deliver or assist in the delivery of papers to other newspaper sellers, provided that going to a nearby corner or across the street for the purpose of getting papers shall not be construed as a violation of this provision.

18. It is understood and agreed that members of the Union while on duty shall not perform any services for

anybody other than the Publishers, unless consented to by the Publishers.

19. The Publishers agree that the wholesale price of newspapers to anyone in the A. B. C. Cleveland city zone shall not be less than the price to members of the Union.

20. The Publishers agree that any seller of newspapers now receiving a pay card and who does not come under the minimums guaranteed in this contract, shall continue to receive his pay card as now received by him. It is further provided that all guaranteed seliers receiving pay cards shall continue to receive same and such pay cards shall be increased Three Dollars ($3.00) per week, provided that when a new seller starts on such guaranteed corner where a pay card now is in effect the Publisher shall not be required to pay more than the minimum guarantee. All guaranteed sellers not now receiving a pay card shall henceforth receive a Three Dollar ($3.00) pay card. In a case where a seller is transferred he shall not be classed as a new seller for the purpose of abolishing the pay card on the corner to which he is transferred, and such seller so transferred shall receive the pay card of the seller on the corner to which he is transferred.

21. No member of the Union shall be required to serve more than one Publisher at the same time on a corner unless conditions and causes justify it in the opinion of the Publishers; provided that on any corner where this clause is invoked the seller oldest in continuous service, competency being equal, shall be given preference, and the seller so eliminated shall be given preference by the Publishers in filling any vacancy which may occur, if no seller of greater competency is available; and further provided, such seller so eliminated through combination corner shall replace any guaranteed seller who has been selling less than six months.

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22. In the event of any change in the present retail price of newspapers party to this contract during the life of this contract, then in such event the Union may upon notice to the Publishers open negotiations as to wages and such negotiations shall commence within ten (10) days after receipt of such notice. In the event of a change in present edition time of first or last editions by more than one and one-half hours during the life of this agreement, then in such event either party may upon notice to the other party open negotiations for changes in hours, and such negotiations shall commence within ten (10) days after receipt of such notice. It is further understood and agreed that in either or both events the parties may agree that the contract shall continue unchanged until the period of the contract hereinbefore designated expires.

23. *Arbitration.* The parties hereto, being desirous of maintaining harmonious relations, hereby mutually agree to settle all grievances and disputes that may arise under this contract by conciliation, and if conciliation fails, by arbitration, as follows:

All grievances that may arise as to the construction to be placed upon any part of this contract shall first be brought to the attention of the other party and if no satisfactory settlement is reached then the dispute may be submitted in writing to a joint standing committee consisting of two representatives appointed by the Publishers and two representatives appointed by the Union for settlement; said committee shall meet to consider said difference within five (5) days after filing of same, and attempt to settle the dispute; if a settlement is not made within ten (10) days after being submitted to said committee, then the settlement of such dispute shall be left to a Board of Arbitration, as hereinafter constituted. Failure to comply with the procedure or time limits provided herein shall constitute default of any grievance raised by

either party, except that said time limits may be extended by mutual agreement.

Said Board of Arbitration shall consist of five members, two of whom shall be chosen by the Publishers, two by the Union, and the fifth member shall be chosen by the other four. The fifth member of the Board shall act as chairman; he shall be entitled to vote and voice on all questions. He shall be fair and impartial, not connected in any way, interested in, nor obligated to, either the Publishers or the Union. The fifth member of the Board at the time the decision is rendered, after due consideration of all of the evidence, shall determine his honorarium or fee for services as Chairman, it being understood and agreed that the amount set by the Chairman shall not exceed Two Hundred Dollars ($200.00), and shall be divided equally between both parties.

The decision of a majority of this Board shall be final and binding upon all parties. Pending an arbitration award neither party shall change the conditions then existing nor apply coercive or retaliatory measures designed to compel the other party to accede to its demands.

In Witness Whereof, the parties hereto have executed and caused this agreement to be signed in duplicate, the Publishers by their corporate officers duly authorized to act in the premises, and the Union by its officers and the members of its negotiating committee duly authorized to act for and on behalf of the members of the Union in the premises, this 9th day of June, 1937.

United Newspaper Sellers and Carriers
of America

By .....

By .....

By .....

By .....

By .....
By .....
By .....

The Scripps Publishing Company
By .....

The Plain Dealer Publishing Company
By .....

The Cleveland Company
By .....

APPENDIX "E"

UNION AGREEMENTS

Seattle Newspaper Agreement

This Agreement, made and entered into by and between Seattle Post-Intelligencer Department, Hearst Publications, Inc., publisher of Seattle Post-Intelligencer; Star Publishing Company, publisher of Seattle Star; and Seattle Times Company, publisher of Seattle Times, of Seattle, Washington, constituting the party of the first part, and sometimes hereinafter referred to as the Publishers, and Seattle Newsboys Union No. 15834 (affiliated with the American Federation of Labor) party of the second part, hereinafter sometimes referred to as the Union.

Witnesseth: 1. It is understood and agreed that members of Newsboys' Union, Local 15834 shall have the exclusive right to sell newspapers of the Publishers on the streets and street corners in the following described area only, except as hereinafter provided, to wit: The downtown area of the City of Seattle, starting at a point at

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Waterfront and King Street, extending east on King Street to Second Avenue, south on Second Avenue to Dearborn Street, east on Dearborn Street to Seventh Avenue South, north on Seventh Avenue South to Jackson Street, east on Jackson Street to Ninth Avenue, north on Ninth Avenue to East Denny Way, west on Denny Way to Elliott Avenue, south on Ellicott Avenue to Bay Street, west on Bay Street to Waterfront, south on Waterfront to King Street, also the intersection of Twelfth Avenue and Jackson Street.

2. It is understood and agreed that this agreement shall not apply to carrier salesmen, branch salesboys or newsdealers.

3. The Publishers agree that they will not permit carrier salesmen to make single-copy sales in the area described in Section 1, nor deliver editions later than the white Home-delivered Edition of the *Times*, *Star* and *Post-Intelligencer* in this area, excepting on Saturdays.

4. In consideration of the exclusive privilege of Newsboys' Union members to sell newspapers in this area, the party of the second part agrees that its members will not sell any newspapers or periodicals, other than those of the party of the first part; provided, however, that the party of the second part will be permitted upon the establishment of a competitive bona fide daily newspaper to enter into an agreement in identical form with this agreement.

5. Corner owners and operators shall furnish adequate and equal display for all newspapers day or night on each of the four or more corners at street intersections in the downtown area, such display to include boxes where necessary. As used in this agreement, a corner owner or operator is understood to be any person who claims the right to buy and sell newspapers on a certain corner and is recognized by the Union.

Appendix "E"

6. In cases where it is necessary for corner owners or operators to hire helpers or assistants in order to provide adequate representation, the corner owners or operators shall employ individuals of their own choosing and shall be responsible for such helpers and assistants in all respects and shall determine their wages, hours and working conditions. It is specifically understood and agreed that the corner owner or operator is at all times responsible for the efficient handling of newspapers on his corner or corners. Any unusual decrease in sales shall be satisfactorily explained to the Publisher affected and the Union will take the necessary steps to maintain efficient service and safeguard the interests of the Publishers. Such inefficiency as may be reported must be promptly remedied by the corner owner or operator. Each Publisher shall be the judge of inefficiency in handling its product. Should any Publisher find that its product is inefficiently handled, such fact shall be called to the attention of the corner owner or operator, who shall correct the matter within twenty-four (24) hours. If correction satisfactory to the Publisher is not made within twenty-four (24) hours, the matter shall be reported to an officer of the Union. If correction satisfactory to the Publisher is not made within twenty-four (24) hours after such protest to the Union, the Publisher shall have the right to replace the corner owner or operator with an individual or individuals of its own choosing; provided, that said corner owner or operator shall have the right of appeal to the special standing committee.

7. Corner owners and operators shall pay for papers at close of each day but shall receive full credit for all unsold papers purchased by them from the Publishers for sale in the downtown territory and returned to the Publishers; provided, that all unsold papers returned for credit must be received by the Publishers or their repre-

sentatives not later than twenty-four hours following the sale of the papers to the corner owner or operator, except that an additional twenty-four hours shall be allowed if the original return period expires on a holiday or the day after a holiday.

8. In cases where extra editions are put out, Publishers desiring additional coverage shall first employ members of the Union when available, but in no event shall such sellers occupy corners which are regularly covered.

9. Corner owners and operators and their assistants and helpers shall sell newspapers only at the regularly advertised single-copy price. The Union agrees that any of its members who sell newspapers of the Publishers at any price other than the published single-copy price shall be prohibited from selling papers in the downtown area and shall be replaced immediately with newsboys who will maintain the regular price schedule.

10. The prices to be paid by corner owners and corner operators for newspapers of the Publishers for all daily editions shall be as follows:

Where the single-copy price is—	*Corner owner or operator shall pay—*
5c	2½c
4c	2c
3c	1½c
2c	1c

Prices for Sunday editions shall be as follows:

Where the single-copy price is—	*Corner owner or operator shall pay—*
15c	10c
10c	6½c

It is understood and agreed that the above prices shall apply to all editions; provided, when papers are sold on the streets for mailing by a Publisher, the single-copy retail price and the wholesale price to the corner owner or operator shall be adjusted by the Publisher to provide for mailing charges; provided further, in no case shall such prices be adjusted so that the profit per copy sold by the corner operator shall be less than for similar sales of regular editions.

11. Immediately after this agreement becomes effective a special standing committee of four (4) members shall be appointed, two (2) members of said committee to be named by the party of the first part, and two (2) members by the party of the second part. Immediately after the members of the special standing committee have been named, the party of the first part shall send the names and addresses of its representatives on the special standing committee to the party of the second part, and the party of the second part shall send the names and addresses of its representatives on the special standing committee to the party of the first part. In case of a vacancy on said special standing committee from any cause, said vacancy shall be filled immediately by the appointment of a new member by the party in whose representation on the special standing committee the vacancy occurs. Each party shall notify the other party immediately of any change in its representation on the special standing committee. If at any time either party desires that one of its representatives on the special standing committee shall appear in the capacity of advocate before the board of arbitration provided for in this section, said representative shall resign from the committee and a new representative shall be appointed in the manner hereinbefore provided. Members of the special standing committee may be represented by proxies.

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To the special standing committee shall be referred for settlement all disputes arising out of the operation of this agreement, all disputes regarding the interpretation of any portion of this agreement, all disputes between any Publisher and any member of the Union, and any and all disputes between the parties hereto, except as in this section provided. The special standing committee must meet within five (5) days from the date on which either party hereto, through its authorized representative, notifies the other party in writing that a meeting is desired, and shall proceed forthwith to attempt to settle any question raised by either party in the written notification. It is definitely understood and agreed that the special standing committee must meet within the five (5) days precribed herein upon notification in the manner herein provided. It is understood and agreed that the special standing committee is established by the terms of this agreement for the settlement of the disputes hereinbefore enumerated, and that the special standing committee is the proper body to take up such disputes in the first instance and to settle them finally in the manner herein provided.

The special standing committee shall have complete jurisdiction over all the aforesaid disputes. The special standing committee shall have no jurisdiction over the settlement of any new agreement, but said committee shall have complete jurisdiction over all other differences arising under this contract.

It shall require the affimative votes of at least three (3) of the four (4) members of the special standing committee to decide the issues, and the decision of the special standing committee in all cases shall be final and such decision shall be binding on the parties hereto.

If the special standing committee cannot reach an agreement on any dispute within ten (10) days (this time

may be extended by unanimous agreement) from the date on which a dispute is first considered by it, at the request of either party hereto, the members of the committee shall form a board of arbitration and shall select a fifth member, who shall be a disinterested party and who shall act as chairman of the board. The board of arbitration thus formed shall proceed with all dispatch possible to settle the dispute.

Said fifth member may be selected in any manner unanimously agreed upon by said four (4) members.

It shall require the affirmative votes of at least three (3) of the five (5) members of the board of arbitration to decide the issues, and the decision of the board of arbitration in all cases shall be final and such decision shall be binding on the parties hereto.

All expenses of the board of arbitration shall be shared equally by the party of the first part and the party of the second part.

Local union laws, rules or resolutions not affecting the interests of the Publishers shall not be subject to arbitration. Disputes or differences as to whether local union laws, rules or resolutions affect the interests of the Publishers shall be referred to the aforesaid special standing committee for settlement, and local union laws, rules or resolutions that affect the interests of the Publishers shall not be made effective without the consent of the Publishers.

This agreement shall be in full force and effect on and after July 1, 1937, for the three years ending June 30, 1940, and thereafter until a new agreement has been settled by conciliation or arbitration in accordance with the terms and provisions of that certain Arbitration Agreement made and entered into by the parties hereto on the fifteenth day

of December, 1936, a copy of which is attached hereto and made a part hereof.

In witness whereof, the said parties, by their representatives duly authorized to act, have hereunto set their hands and seals this 29th day of June, 1937.

Seattle Post-Intelligencer Department.
Hearst Publications, Inc.,

By (Signed) J. J. Callaghan,
Star Publishing Company.
By (Signed) F. W. Webster,
Seattle Times Company.
By (Signed) A. F. Logan.
Seattle Newsboys' Union No. 15834
(Signed) C. Gust Dahlbeck.
(Signed) Frank Turco,
(Signed) Virgil L. Steinmetz.
Seattle Central Labor Council.
By (Signed) C. W. Doyle,
American Federation of Labor.
By (Signed) Leo F. Flynn.

This proviso attached to and made a part of this agreement provides that the undersigned members of the Newsboys' Union No. 15834 subscribed to said agreement, and to the dues in the form of corner assessments from time to time to meet changed conditions.

APPENDIX "F"

(From Issue of Editor and Publisher June 22, 1940)

3 CLEVELAND DAILIES ABANDON STREET SALES

News, Press and Plain Dealer Take Action in Second Week of Corner News Sellers Strike

Cleveland, O., June 19—The deadlock in the strike of corner news sellers against the News, Press and Plain Dealer tightened in its second week as publishers of the three papers announced indefinite abandonment of all street sales. The action was believed the first of its kind in a large city.

Charges of "lockout" were raised and violence continued with new intensity following the announcement Tuesday. The statement, issued by Stewart Hooker, secretary of the Cleveland Newspaper Publishers Association, said:

"Each of the three daily newspapers has decided upon a change of policy with regard to distribution and sale of newspapers. Street sales have been discontinued and the following notice has been forwarded to all street vendors:

NOTICE TO VENDORS

"This is to advise you that (name of newspaper) has changed its policy in the distribution and sale of its papers. This paper has decided to discontinue sales by street vendors. All distribution will henceforth be made through home delivery carriers, stores and merchants who have for many years past carried the larger part of retail sales.

"We regret to advise that this change of policy terminates the arrangement under which you have been selling. Should this newspaper ever decide to return to the policy of street vendor sales, we will so notify you and again offer you the opportunity to resell our papers."

Appendix "F"

Phillip Schoenberg, attorney for the unaffiliated Cleveland Newsboys' Union which called corner news sellers out on strike June 10, said the action of the publishers had converted the dispute into a lockout. "This maneuver," Mr. Schoenberg said, "is nothing less than a ruse to destroy the union."

Informed of the publishers' action at a meeting Monday night, union members voted to "continue the fight and protect our rights." Meanwhile, unemployment compensation claims for the full 16 weeks' period have been filed in behalf of each striker.

SEEK NLRB CHARGES

Efforts of the union to bring charges against the papers before the National Labor Relations Board met with postponements this week. Hearing on a charge that the papers had refused to bargain with the Newspaper Home Deliverers Association, an affiliate, was postponed by Oscar S. Smith, NLRB regional director, because of failure of the union to produce signed membership cards as proof of the union's authority to represent carriers (the union claims 7,000 of the city's 10,000 carriers as members). Mr. Schoenberg said the cards were being obtained this week.

On Wednesday Mr. Schoenberg said that the publisher's announcement to discontinue street sales would result in the filing of similar charges in behalf of corner vendors.

Vandalism grew in all parts of the city following the announcement. A restaurant counterman was kicked and beaten into unconsciousness by three men who objected to the restaurant's sale of copies of the Plain Dealer. Police have arrested more than 60 persons on charges of malicious destruction and disorderly conduct. Picketing of the three newspapers and of many stores selling the papers, continued this week.

Appendix "F"

The strike, probably the largest of its kind, represents one of the few occasions when all big daily newspapers of a major city have been involved simultaneously. The union in attempting to bargain for home delivery carriers has asked that carriers' pay be raised from seven-eighths of a cent to a cent per paper. The publishers contend that carriers are minors covered by individual contracts and are therefore, "none of the union's business."

Support for the union in the strike has been voted both by the Cleveland Federation of Labor, AFL subsidiary, and the Cleveland Industrial Union Council of the CIO. The newsboys' union is affiliated with neither organization.

(*Issue of Sept.* 4, 1940)

STRIKERS SELL WEEKLY

Cleveland, Sept. 2—Members of the Cleveland Newsboys' Union, which struck three months ago against the Cleveland Press, News, and Plain Dealer, are selling the Cleveland Sun, a new weekly paper, which made its appearance Saturday, Aug. 17th, on downtown street corners. The first issue of the paper included an article exposing the "real story" of the newsboys' strike, written by Philip Schoenberg, attorney for the union. Listed as publisher of the paper is J. D. Peltz, a Cleveland man whose labor troubles forced him out as manager of a food market in East Cleveland, and who was later owner of a used car business which the Cleveland Better Business Bureau charged used illegal and unethical business methods.

APPENDIX "G"

MEMORANDUM OF AGREEMENT between BULLETIN COMPANY, THE PHILADELPHIA INQUIRER CO., PUBLIC LEDGER, INC., and PHILADELPHIA RECORD COMPANY; and PHILADELPHIA NEWSPAPER CARRIERS UNION LOCAL No. 20442, affiliated with the American Federation of Labor; all of the City of Philadelphia:

1. The parties recognize that a one-third spread between the wholesale and the retail price of daily newspapers for the purpose of single-copy sales on the streets is fair, and in recognition of this principle the companies will establish, beginning May 9, 1939, as the wholesale price of the daily newspapers for the purpose of single-copy sales on the streets the rate of $2.00 per one hundred copies, provided that the established retail price of the said daily newspapers remains at 3c.

2. Publishers' representatives will confer with newsboys' representatives to eliminate competition with cornermen by floaters, rovers and bootjacks, on a basis not substantially to decrease newspaper sales, and to give preference to newsboys covering corners six nights a week in the event they desire to sell Sunday bulldog editions.

3. Publishers' representatives will confer with newsboys' representatives from time to time as the occasion may warrant for the disposition of other complaints and grievances and the more effective sale and distribution of newspapers.

4. In the event of vacancies on corners where papers are sold or are to be sold the companies will recognize the priniciple of the so-called "preferential shop"—that is to say, if more than one person is being considered for the

vacancy, of equal ability and claim to the corner, preference will be given to the person suggested by the union; in every case, however, the individual suggested must be satisfactory to the publisher or publishers involved.

5. The union agrees that its members will push the sale of all Philadelphia newspapers and, where stands are used, will give prominence to these papers on such stands.

6. Corner men engaged in the daily sale (except Saturday night) of the so-called bulldog edition of the morning newspapers will receive as a "cut" or expense allowance the minimum sum of 50c each daily from each morning newspaper publisher, this "cut" or expense allowance provision to be effective from December 6, 1938. Corner men who were paid 50c or more before the date of this Memorandum will continue to receive such "cut" or expense allowance from each such publisher without change.

7. The wholesale price of the Sunday Inquirer and of the Sunday Record shall remain at 8c for a period of two years from December 6, 1938, provided that the established retail price of said Sunday newspapers remains at 10c.

8. The signing of this Memorandum is not to be construed as indicating that corner men are employees of companies.

9. This agreement shall be in force until and including May 9, 1942.

Bulletin Company
By .....
The Philadelphia Inquirer Co.
By .....
Public Ledger, Inc.
By .....
Philadelphia Record Company
By .....

Appendix "H"

Philadelphia Newspaper Carriers Union, Local No. 20442.
By .....
Business Agent

.....
President

.....
Financial Sec'y.

APPENDIX "H"

"(1) *Nature and Functions of Newspapers Preclude their Classification as 'tangible personal property' under the Act.* (Brief for Intervening Publishers, pages 3-10.)

"For more than four hundred years the newspaper has been the most important agency of mass communication known to man. Only recently, with the phenomenal rise of radio broadcasting, has any other agency of mass communication been developed even approaching the news paper in importance. With its intricate network of sensitory nerves, the newspaper gathers news and intelligence from every part of the globe and discloses it to the public. It furnishes vital information regarding the public and business affairs of the people. It furnishes an open forum for discussion. It interprets the desires and ideals of the people.

"Not only does the newspaper furnish to its readers the wealth of intelligence and information in its news columns, but it also furnishes a valuable commercial service, as well, through its advertisements. To a man out of work, the best news in the morning paper may

be a want-ad offering him a job. To persons about to purchase clothes, furniture, or an automobile, the best news in the morning paper may be the advertisements telling them where these may be purchased at reasonable prices. These people are not assisted in their problems by two or three cents' worth of tangible personal property; they are assisted by the advertising service the newspaper furnishes its advertisers and its readers. The newspaper publisher brings together employer and employee, merchant and customer, and thus performs a valuable service to both.

"While the newspaper is, presently, the most important agency for the dissemination of news and information, there are many services engaged in furnishing news and advertising to the public. Among the many mediums, the following might be mentioned: Radio, outdoor signs, billboards, bulletin boards, street-car signs, weekly newsletters, such as the Kiplinger Washington letter, ticker services and newsreels. All these services are concerned in distributing to the public the latest news and advertising. Whether the public gets this information from one of these services or from the newspaper, in no instance is it concerned with acquiring tangible personal property. The public is concerned with acquiring information, the newspaper and these other services are solely concerned in distributing information, and no one of them is selling or dealing in tangible personal property.

"When one subscribes to a newspaper, he intends to buy a news service, and the content of quality of that service is what determines his choice of newspaper. No one ever subscribed to a newspaper because of the grade of paper, the character of the type, or the color of the ink with which it was printed. No subscriber bargains for a newspaper with a certain number of pages. Why is this? It is because he is not buying paper. He is

buying news, and news is an intangible that cannot be measured by pages.

"(2) *Newspaper Publishers and Distributors Commonly Considered Supplies of Service, Rather than Retailers of Tangible Personal Property.*

(Brief for Intervening Publishers, pages 10-17.)

"The class described in this statute is well understood by the business world and by people in general. It includes, in the common and popular conception, merchants, jobbers, retail traders, and persons generally engaged in the business of selling goods and merchandise as those terms are generally understood.

"The only conceivable tangible property transferred to a purchaser of a newspaper is the paper and ink. The general public does not think of a newspaper publisher or distributor as a retailer of paper and ink, as such. The general public thinks of the newspaper publisher and distributor as being engaged in the business of disseminating news and information. The purchaser of a newspaper opens it with the same desire that causes him to tune in on a radio newscast or to look at a ticker tape. He wants and receives news and information and that is what he pays for. The business of the publisher and the distributor is to furnish this news and information and they are paid for performing that function. Paper and ink, commercially valueless, are transferred only as an incident to the transmission of this news and information.

"Popular understanding that newspapers are not ordinary tangible goods usually dealt in by retailers is reflected by the almost unanimous holdings of the courts that the business of publishing a newspaper is not 'manufacturing.'

"(4) *Newspaper Distributors an Integral Part of Newspaper Publishing Business.*

"Only a few newspaper publishers distribute all of their newspapers directly to their readers. Almost without exception, the publishers of large and small newspapers, alike, employ independent distributing agencies as indispensable arms of their circulation department. Inasmuch as these independent distributing agencies deliver a particular newspaper to the reader upon the payment by the reader of two or three cents, it might conceivably be suggested that, although the newspaper publisher is engaged solely in a service occupation, the newsboy or newsstand operator is merely a retailer or a merchant making a sale of tangible personal property. *Such a suggestion, of course, invites approval of an anomalous and ridiculous situation in which a single transaction (the delivery of a newspaper to a reader), if performed by the newspaper publisher directly, would constitute the rendition of a service, but would constitute the sale of personal property at retail, if performed by a newsboy. In addition, such a suggestion completely ignores the integral part of newspaper distributors in the dissemination of news.*

"The fundamental relationship in connection with a newspaper is the relationship between the publisher and the reader. The publisher laboriously gathers, correlates, and prints news items from all over the world and the reader pays for this news and information. To make it easily and speedily accessible to the reader, various methods of distribution through intermediaries have been developed. *In each case the choice of intermediary has been dictated by the pressing necessity for the utmost speed in furnishing an extremely perishable intangible to the public.* Such intermediaries, variously called distributors, carriers, newsboys, and newsstand

operators, are the ones who actually 'place the daily events of the world at the breakfast table of millions.' It avails little, after a newspaper is printed, if it is not readily accessible to the public for whom it was intended. The intimate relationship between the publication and the distribution of newspapers is pointedly recognized in the case of *Lovell v. Griffin* (1937), 303 U. S. 444, holding that the freedom of the press guaranty was violated by an ordinance forbidding the distribution of printed material without a license. The court said at page 452:

> "'The ordinance cannot be saved because it relates to distribution and not to publication. "*Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.*"' (Italics supplied)

"*The newsboy provides the indispensable link in the dissemination of news without which the service rendered by the newspaper would be almost entirely ineffective.* The function of the newsboy in disseminating news and intelligence is demonstrated graphically by the case of *Wilson v. McGill*, 42 D. & C. (Pa.) 74 (1940, Court of Common Pleas, Philadelphia County), in which an adjoining property owner sought to enjoin the maintenance of a newsstand on the sidewalk. The court said, in part:

> "'It is readily apparent that under modern conditions newspapers are more than a public convenience; they are a necessity. * * * Democracy, so much dependent upon a well and quickly informed public opinion, cannot be expected to survive without the organized publication and the speedy and unhampered distribution of news, protected by the constitutional doctrine of freedom of the press. "Liberty of circulating is as essential to that freedom as

liberty of publishing; indeed, without the circulation, the publication would be of little value.'" *Lovell v. City of Griffin*, 303 U. S. 444 (1938), quoting from *Ex parte Jackson*, 96 U. S. 727.

"'The circulation of newspapers in our great cities through newsstands on commercial corners has become a well established custom, meeting an urgent public need. It is a fact of common knowledge and a proper subject of judicial notice. As newspapers have become more and more vital to the democratic process, the reading public has grown enormously. With the rapid growth in the speed of communication throughout the world, the number of daily editions has steadily increased. *In this constantly growing development in the dissemination of news, the newsboy and his corner newsstand have achieved a definite and essential place.*' (Italics supplied.)

"In like manner, the Supreme Court of Kansas held, in the case of *State v. Needham* (1931), 4 Pac. (2) 464, that the distribution of newspapers was a 'work of necessity' under a statute prohibiting any labor on Sunday except 'works of necessity or charity.' The court said, in part, at page 465:

"'At this stage of the world's progress, with the means of gathering news that are available, we have grown to expect far more expeditious service on the part of newspapers of the state than was received during the days when the statute in question was passed. * * * We are becoming aware more than ever of the effect political and economic upheavals in countries on the other side of the globe have upon our business affairs. When we know that the King of Spain is about to abdicate, we expect to be able to read the details of it the next morning when the paper

is thrown on our porch. * * * In order to bring us this information, the news gathering agencies are far flung to the uttermost ends of the earth. * * *

* * * the metropolitan Sunday newspaper is a necessity and the work of distributing it necessary work.'

"It has been shown heretofore that the publication and distribution of newspapers by the publisher are not sales of 'tangible personal property' under the Retailers' Occupation Tax Act, but constitute the rendition of a service. It has likewise been shown that the reader intends to and does buy a service. A service being delivered by the publisher to the reader cannot become 'tangible personal property' simply because it passes through the hands of an intermediary. It is submitted that the whole sequence of publishing and distributing is one function—that of gathering and disseminating news and information to the public.

"The publisher, at the beginning of the successive steps in the distributive system may (and the great majority of publishers actually do) sell their newspapers to the newsstand, carriers or wholesaler, as the case may be, and these, in turn, may and do sell the newspapers to the next person in the system or to the ultimate reader, but that does not alter the fact that the subject matter sold is *news* rather than tangible personal property. The publisher is not engaged in the sale of tangible personal property. The reader is not purchasing tangible personal property. It follows that a particular method of distribution of a service cannot change the service into tangible personal property in the hands of the distributor or carrier, and then change it back again from tangible personal property to a service when it comes to the hands of the reader. The reader receives a service, regardless of what method is used to deliver it to him. *The methods of distribution are*

merely different types of conduits to facilitate the smooth and prompt flow of this service from the publisher to the reader.

"The newsboy commonly returns and receives credit for all copies of an earlier edition which are unsold when a later edition, containing more recent news and information, appears. The papers returned are physically intact and of the same quality as those later received. They are returned by the newsboy and accepted for credit by the publisher because they have lost all of their commercial value and cannot be sold. Inasmuch as the paper and ink involved do not deteriorate in the short period between editions, the decline in commercial value of the old edition can only be explained by the fresh news and information contained in the new edition. Since the old papers cannot be sold and since the new papers, of the same physical quality and makeup, can be and are sold, *the conclusion is inescapable that the newsboy is really selling intangible news and not the tangible paper and ink.* The paper is merely a convenient means of transferring the news and information he has for sale. 'The paper is a mere incident; the skilled service is that which is required.' (*Burgess Company v. Ames* (1935) 359 Ill. 427.)

"The sales tax laws of twenty-two jurisdictions in the United States outside of Illinois, which have such a statute, are analyzed in Section III of this brief. It is shown there that, in twenty-one of these twenty-two jurisdictions, receipts from the distribution or sale of newspapers to the public by news distributors, carriers or newsboys, as well as by the publishers, are exempt from the sales tax either by legislative or administrative action. This almost complete unanimity of opinion in other states is, of course, not binding on the Attorney General, the courts or the administrative authorities in Illinois. *It is, however, persuasive evidence that newspaper distributors, as well as*

newspaper publishers, are commonly regarded as being engaged in the rendition of service, rather than in the sale of tangible personal property.

* * * * * * * * *

"B. THE ATTORNEY GENERAL ERRED IN CLASSIFYING NEWSPAPERS WITH BOOKS AND MAGAZINES.

"There is no justification either in authority or reason for the grouping of newspapers with magazines and books to determine taxability. As is shown in Part III of this brief, the distribution of newspapers is not subject to the retail sales tax in any of the other twenty-two jurisdictions having such taxes, except Kansas. In eleven of these jurisdictions, although the distribution of newspapers is not taxable, the tax is nevertheless imposed upon the sale of magazines. These jurisdictions are: *Colorado, Iowa, Louisiana, Mississippi, Missouri, North Dakota, Ohio, South Dakota, Utah, Washington,* and *Wyoming.* In no jurisdiction has the sale of books been exempted from this tax.

"The distinction which has thus been drawn in the application of the tax in these jurisdictions, between newspapers on the one hand and books and magazines on the other, simply reflects the public conception of the nature and purpose of newspapers as opposed to that of books and magazines.

"While some newspapers may at times carry articles somewhat comparable to those appearing in certain magazines and while some magazines may attempt to disseminate news, such departures from the norm do not justify the statement of the Attorney General, in paragraph 2 of his opinion, that:

"'The newspaper may be a small magazine or miniature book, differing from a magazine or book

in size, shape, binding and content. To a degree all may, and frequently do, contain identical subject matter.'

To the extent that the Attorney General attempts by these two sentences to lump the standard newspaper, the usual magazine, and the ordinary book into an indistinguishable mass, *the Attorney General flies in the face of common experience and knowledge.*

"*A newspaper is published primarily to disseminate information of passing events as they occur. The extreme perishability of news and the issuance of new editions at short intervals render unnecessary and impractical any attention to the permanence or value of the medium. As a result, the medium for the transmission of the news is almost as perishable as the news itself.* On the other hand, magazines and books ordinarily contain treatises or articles of literary or scientific value such as the purchasers desire to read and preserve for future reference. For this reason, books and magazines are customarily printed upon a better quality of paper and are bound for greater permanency. For the same reason a great deal more effort and money are expended to make the article appear beautiful and attractive.

"The buyer of a book or magazine receives an article which he can and usually does retain for months or years because of its own intrinsic value. After they have been read, books and magazines still have a definite commercial value, as is indicated by the fact that they are regularly sold at secondhand sales and in shops. A newspaper, on the other hand, becomes practically valueless and is ordinarily discarded as soon as it is read.

"Mention should also be made of other characteristics of the newspaper, distinguishing it from the magazine or book. Too much emphasis cannot be placed upon the im-

portance of the newspaper as an agency of mass communication. Magazines and books instruct and inform the public it is true, but for every magazine or book entering any home hundreds of newspapers enter. Even though the family cannot afford magazines or books, newspapers give it the news of the world. Furthermore, as is stated in Part I of this brief, the newspapers, in publishing public and official notices, act as the mouthpieces of the various governmental bodies, making known information which those bodies desire the public to receive. This service function has not been and cannot be performed by magazines or books.

"The Supreme Court of Illinois has explicitly recognized a distinction between newspapers and magazines in the case of *City of Chicago v. Rhine* (1936) 363 Ill. 619. This was a suit brought by the city to enjoin defendant from offering for sale, etc., magazines in front of 22 South Clark Street, Chicago, in violation of an ordinance which prohibited the sale of magazines and other merchandise on the streets in the loop and the Wilson Avenue district. The ordinance excepted the sale of newspapers from its operation. Defendant contended that the ordinance was unreasonably discriminatory and unconstitutional because it prohibited the sale of magazines but permitted the sale of newspapers in the restricted area. The court, in rejecting the argument, said at page 624:

> "' ' ' * ' That someone else is given the privilege of selling newspapers (a commodity not within the same class as the article the defendant was exposing for and offering for sale), did not constitute an unconstitutional discrimination against him. The classification made by the city by which daily newspapers were exempt from the operation of the ordinance was valid.'

Appendix "H"

"Accordingly, there is no factual basis for the easy assumption by the Attorney General that the distribution of newspapers must be taxed, if the sale of either books or magazines is subjected to the retailers' occupation tax. On the contrary, a careful consideration of the characteristics and function of books, magazines, and newspapers leads inescapably to the conclusion that, regardless of the decision as to the taxability of magazines and books, the distribution of newspapers is not and should not be taxable under the Retailers' Occupation Tax Act." (Brief for Intervening Petitioners in Calumet Publishing Company, et al. v. McKibbin, et al., Circuit Court, Cook County, Illinois, Nos. 41-C-3507, 41-C-5874, in Equity, March 30, 1942.)

APPENDIX "H2"

IN THE CIRCUIT COURT OF COOK COUNTY.

OPINION OF THE COURT.

State of Illinois,
County of Cook, ss.:

Calumet Publishing Company et al., Chicago Tribune et al., intervening plaintiffs,

Plaintiffs,

v.

George B. McKibbin, as Director of Finance; Warren Wright, as State Treasurer, and George F. Barrett, as Attorney General, all of the State of Illinois.

Defendants.

No. 41-C-3507.

The Interstate Company et al.

v.

George B. McKibbin.

No. 41-C-5874.

Proceedings had in the above-entitled cases, before the Hon. Harry M. Fisher, one of the judges of the Circuit Court of Cook County, on Monday, March 30, 1942, at the hour of 11 o'clock a. m.

Appendix "H2"

Present:

Messrs. Phillips & Gately, by
Mr. John E. Toomey,
appearing in behalf of plaintiffs;
Hon. George F. Barrett, Attorney General of the State of Illinois, by
Mr. Oliver H. Bovik, Assistant Attorney General,
appearing in behalf of intervening complainant;
Messrs. Kirkland, Fleming, Green, Martin & Ellis, by
Mr. Manly K. Hunt,
appearing in behalf of the Chicago Tribune, The Times, and the Chicago Sun;
Mr. Edward Woods, by
Mr. Solomon,
appearing in behalf of the Herald-American;
Mr. H. H. Scheier,
appearing for the Journal of Commerce;
Messrs. Bell, Boyd & Marshall,
appearing in behalf of Chicago Daily News;
Messrs. David & Fainman, by
Mr. Sigmund W. David,
appearing in behalf of the Interstate Company, an intervening complainant.

DECISION OF THE COURT.

The Court: * * * I shall discuss first the intervening petition of the newspapers. The point here presented is simple and calls only for the determination of the character of the business of a newspaper and its distributors with a view to ascertaining if they come within the definition of the Retailer's Occupational Tax Act as taxable occupations.

Appendix "H2"

It is the position of the plaintiffs that the publishers and distributors of newspapers render service to the public, and that the sale of the newspaper for some trifling consideration is simply incidental to the business of disseminating news and information. It is also claimed that such sales are not sales of tangible personal property within the meaning of the act; that what is in fact sold, if there is a sale, is not the paper and ink, but intelligence, information, and that these are intangibles.

The position of the defendant is that since the paper that is sold is something that can be perceived by the citizens—may be seen, felt and has body—it is tangible property, and therefore the sale of it comes within the meaning of the act.

It is hard to escape the conclusion that the publishing and selling of newspapers is primarily a service occupation; that the thing that is being sold is the gathered-up intangible material for the enlightenment or entertainment of those who purchase the newspaper and that the paper upon which the material is printed is simply the vehicle or the instrument by which the information is passed on from the publisher who gathered it to the person who seeks it.

A newspaper is a sheet of paper upon which is imprinted in intelligent form the news of the day, the utterances and offers of the advertisers, the drawings of cartoonists, the reproduction of photographs, the interpretation by way of editorial comment of the problems of the day. If some medium other than paper were to be found for the communication of that information to the readers, they would accept it and probably pay the same price for it. It is almost fantastic to argue that the reader purchases his paper simply because he can use it for wrapping purposes. The purchaser is not interested in the nature of the medium used for the conveyance of the in-

formation. What he seeks is the news or the advertisements, or whatever else of interest to him is impressed upon the paper as a visual representation of an idea or a subject matter. The paper appearing on the stand at ten o'clock in the morning will be worthless as a commodity at eleven o'clock if at that hour another edition were to appear having less paper and less ink but containing later news. After the paper is purchased and read, it is, in the terms of one of the cases cited, consigned to oblivion, and the purchaser is ready to buy another paper containing later news.

The public is anxious for information. It is interested in foreign news, domestic news; it is anxious to see an interpretation of the complicated forces which operate about us. It is anxious to ascertain where it can purchase required articles at the most reasonable prices and from the most reliable merchant. It is constantly seeking intelligence upon a variety of matters, intelligence upon the behavior of public officials, upon the action of its government—and the necessity has arisen, not suddenly but developed through the ages, for the maintenance of an institution devoted to the gathering of all that information and of presenting it to those who are interested, in an intelligent form and in the most understandable language. That institution has so progressed that the information is available to everyone who has ability to read or to hear the paper read and at a price relatively insignificant when compared with the cost of gathering that information, and preparing it for distribution.

This institution is able to survive, not by what it profits from the sales price of the newspapers, but because by reaching a large portion of the public, it has become a valuable vehicle for the distribution of information, and those who desire or stand in need of appealing to the pub-

lic use the newspapers as an advertising medium and pay for the space used.

One can become very eloquent in attempting to describe the uses to which newspapers are put in this country. They render service of such paramount value to each community that it is not at all flattering to the public to classify this great and indispensable institution as a retail business engaged in selling tangible personal property for use and consumption. The newspapers not only educate the public on contemporary events by bringing reports of the happenings throughout the world upon the table of each reader, who may assimilate the information while having his breakfast, as was so characteristically said in one of the opinions in a case cited by counsel, but it is the mirror which reflects public opinion, the universal strivings of mankind, conflicts between nations and within each nation or community. It does even more than reflect those opinions. By the selection of the news to be emphasized, by editorial comments, and by interpretations by its columnists it seeks to and often succeeds in influencing and shaping public opinion.

It is the community's watchful eye on the conduct of its officers; it evaluates their work, criticizes and exposes their shortcomings. In short, it is performing a variety of functions without which no democracy can survive—at any rate survive with any degree of intellectual participation in the affairs of government by the general citizenship.

To say that an institution performing such functions is nevertheless simply engaged in the business of selling tangible personal property at retail involves the deliberate disregard of the invaluable services the rendering of which is the primary purpose of those who are engaged in that business and which alone gives it life and guarantees its survival.

Appendix "H2"

As a matter of fact, to say that the newspaper is a business which might be included under any such a general definition as is contained in the Retailer's Occupational Act is to ignore the history of nearly four hundred years replete with struggles, and calculated to take the newspaper business out of the class of ordinary manufacturing or mercantile enterprises. It would mean that we ignore the fact that by our constitutions and laws we have set aside the publication of newspapers as a unique and distinct enterprise, with special guarantees of freedom which we consider of the essence of democratic living.

It is not a manufacturing enterprise devoted to profit-making even though it may be a very profitable enterprise; it is not a mercantile establishment simply devoted to the purchase of a unit at one price and selling it at another. It is, as I have already indicated, an institution, unique, in a class by itself, established for the purpose of rendering those public services which I have already briefly described. In the days of illiteracy the printing of one copy, exposed either on the wall of some public place for those men who could read to peruse it, could and did serve the full purpose of disseminating news; but with the advance of literacy amongst the millions, they have become anxious to know what is happening. To meet the demand for knowledge, the incredible machinery has been developed which reproduces millions of copies of the record of the gathered news which is conveniently distributed amongst all who desire to peruse it at a cost not much greater than the mere cost of distribution.

If the legislature intended that such an enterprise be taxed, it would have specifically provided for it in the act. I would not be very complimentary to the legislature if I concluded that in passing the act as it did it did so either in ignorance of the nature and distinct character of the newspaper business, or, by deliberately ignor-

ing the nature of it, intended by the mere use of the general term, "engaged in the retail business," or similar words to include this enterprise. It must be kept in mind that it is not a sales tax with which we are dealing. It is an occupation tax, and the statute is of the type that must be strictly construed so far as inclusion of enterprises is concerned. Even if the rule of strict construction were not to be applied—taking cognizance of the character of the enterprise here involved, the facts of which are admitted as pleaded in the complaint by the motion to strike—the court would still feel that under a liberal construction the words of the statute are not broad enough to include newspapers within its orbit.

There is yet an additional but more technical reason why I am forced to the conclusion that the enterprise here in question does not come within the definition of a retail merchant as contained in the act. You will recall that the definition is that the tax is assessed against all persons engaged in the business of selling tangible personal property *for use or consumption* and not for resale, and, as I have indicated in cases previously decided here, this statute is unique in this respect—it does not assess a tax upon the business or occupation of selling commodities; it is limited to those who are engaged in the occupation of selling commodities *for specific purposes*, namely: use or consumption.

Before a court can say that a prospective taxpayer comes within the act, it must in each case—in fact, in each sale—ascertain the purpose of the sale. In other words, it must go beyond the person taxed and inquire as to the use to which the purchaser of the commodity puts it—a rather anomalous situation, but we have to deal with it, and so in each case the question is always present, "Was this sale made for use or consumption?"

Now, of course, no one will argue for a moment that a newspaper is consumed by the reader. When he is through reading it, it remains unchanged; not a particle of it is lost; and "consumption," within the meaning of the act, contemplates an actual destruction of the thing. It has to disappear or, at least, vitally change its original form. It is even questionable whether there is a consumption if the commodity was used so that its original character is entirely destroyed, but the elements of which it is made up remain incorporated in some other commodity; but certainly where no particle of the commodity in question is changed or lost and the whole would be useful to another person for the very purpose to which it was originally adapted, no one can contend that there was a consumption or that the paper was purchased for consumption. Now, then, was there a "use" of the paper by the reader within the meaning of the act? Our courts have defined the word "use" as meaning a long continued possession and employment of the thing to the purpose to which it was originally adapted, and not merely a temporary or casual use of it. Could the mere reading of a newspaper possibly come within that definition?

Mr. Bovik: I think so.

The Court: Long continued possession and employment and not a mere temporary or casual use? I cannot possibly see how it could come within that definition.

The answer to it all is that it is not purchased for use or consumption. It is purchased simply for the purpose of gathering from it by the visual and auditory senses the intelligence contained therein. So far as the paper itself is concerned, that which the defendant claims is tangible, it is not purchased for use at all. That paper without the impressions upon it, no one would have

Without the impressions which convey intelligence or ideas, none would pay anything for the paper. The nearest one can come to contending that a purchaser of a newspaper buys if for use, is that he intends using it as wrapping paper. The Attorney General so argued. But this is rather too fantastic to require further discussion. Moreover it may seriously be questioned whether the transaction called in common parlance "the sale of a newspaper" is a sale in the legal sense. An essential element in legal sales is the transfer of title in the commodity sold without a residuum of control of its use remaining in the seller. Can the purchaser of the news make unrestricted use of it? Of course not. The Associated Press and other newsgathering agencies would go out of business if every purchaser of a newspaper could reprint its contents and distribute it. No title passes to the printed material which alone constitutes the consideration for the payment of the purchase price * * *

It is ordered that a copy of the above statement of the court's reasons in arriving at its conclusions be filed and made a part of the record in this case.

State of Illinois,
County of Cook, ss.:

I, John E. Conroy, Clerk of the Circuit Court, of Cook County, and the keeper of records and files thereof, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of a certain Report of Proceedings filed in this office on the 8th day of July, A. D. 1942, in a certain cause lately pending in said Court, on the Chancery side thereof, between Calumet Publishing Company et al., Plaintiff, and George B. McKibbin et al., Defendant.

Appendix "H2"

In witness whereof, I have hereunto set my
(Seal) hand and affixed the Seal of said Court, at Chicago, in said County, this 14th day of April, 1943.

JOHN E. CONROY,
Clerk.